IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

vs.

JOHN G. WARNER, RESPONDENT.

Addressing itself to the supervisory power of this court, petitioner relies more upon the equities of its case, than upon the legal grounds of attack against the decree of the court below.

Impressed with the conviction that if the hard and oppressive character of the contract upon which complainant bases his rights, is once perceived by your Honors, there will be no doubt as to your action, petitioner deems it not unfitting, at the outset, to ask the attention of the court to certain features of the present case, which potently appeal to the fair minded, and strikingly address themselves to the sense of right.

This suit is founded immediately, upon a contract by which, on June 7th, 1876, the Mexican Gulf Ship Canal Company, and W. Van Norden, transferee, conveyed to the City of New Orleans, certain dredgeboats, derricks, barges and other articles, tools and implements, constituting an outfit for drainage work; the price of this sale was three hundred thousand dollars, payable in drainage warrants (see record, page 97).

This same property had been bought by Van Norden from the Canal Company on November 22d, 1872, for the sum of fifty thousand dollars, paid by a release to that extent, of an indebtedness in a much larger amount, owing by the company to Van Norden (record, page 107).

To the ordinary mind, the conspicuous feature of a comparison of these two transactions, is the vast and gross disproportion, between the price for which Van Norden acquired the property, and that for which he sold it to the city; the latter being six times the former.

When there is further considered, the spirited description of the work of canal and levee building done with these very boats and other paraphernalia, from 1871, first, by the company, and then by Van Norden, until they were sold to the city in 1876, one is the more perplexed to understand this marvelous increase in value; unless everyday experience is disregarded and the promptings of common sense rejected, the mind is stunned with the monstrosity of the bargain; surely, a court of justice cannot rise to a higher discharge of duty, than the subjection of such a contract to an ordeal of the closest scrutiny.

It may be replied that by the city's act of purchase, she acquired not only the dredgeboats and like property, but also the rights, privileges and franchises of the canal company, conferred by Act No. 30 of 1876.

But a reference to the statute will show, that the franchises and privileges of the canal company were to dig canals and build levees, for the prices allowed in the act; the purchase of these franchises by the city was less an acquisition, than it was the assumption of an obligation to do the drainage work, and collect the cost thereof from the property liable to assessment under the statute; all this for the benefit of Van Norden. It appears by the appraisement (record, page 95) that the value of the dredgeboats and other tangible property was fixed by the city's appraiser, at one hundred and fifty-three thousand seven hundred and fifty dollars ($153,750); the appraisement contained a reference to the damages claimed by the canal company for delays, upon which, however, no value was placed. It would be interesting to know the basis of the difference between $153,750, the value of the dredgeboats and other property, and the $300,000, which was eventually paid by the city as the price. The claim for damages in no respect entered into this sum, as the subject is not mentioned at all in the act of sale, which is only a conveyance of the franchises of the company and of the tangible property mentioned. The first section of the act of 1876, authorized the city to make the purchase and settlement of the canal company of any rights, franchises or privileges, arising out of the act of 1871; also, the purchase of all tools, implements, machines, boats and apparatus, belonging to the company or its transferee, used for work authorized by the act of 1871; the second section of the act directs an appraisement to be made of the rights and things to be purchased and settled, if the council should deem it advisable to make the purchase. It is seen that the appraisement of the property reached an infinitesimal amount in excess of about one-half of the amount paid, and that the franchises of the company, which, it may be here remarked, had already been sold by the company to Van Norden on November 22, 1872, were not appraised at all.

A possible explanation of this may be found in the assumption that they were considered of no valne, or not susceptible of appraisement at all; the mention in the act of purchase of the payment of twenty thousand dollars ($20,000), in settlement of an amount claimed to have been diverted by the city, furnishes no aid to complainant in this view of his contract.

The significance of the facts here averted to is, that the superiority which your Honors have held to be enjoyed by the purchase warrants over those issued for work, is found in the fact that the former were issued as the price of the sale of property; the fact here shown by the record is, that only a small amount over the one-half of the warrants were issued for such price, or at most for the kind of price that was meant by the court, when it made the distinction between the two classes of warrants, and whether or not complainant's warrants are referable to the number which were given for the price of the boats, or to the residue of the total price, is a question at any time difficult, but in the present state of the record, impossible of solution.

Results harshly affecting hundreds of thousands of people are involved in the decree of the Court of Appeals; it is respectfully suggested that for this reason, if for no other, petitioner's case should receive the most deliberate and painstaking consideration. and that the door of inquiry should be left open by the highest tribunal from which justice can be obtained.

The decree in this case has gone further than the relief prayed for by the complainant; it has condemned the city as the absolute debtor of the warrants sued upon, amounting to six thousand dollars, with eight per cent. per annum interest from June 6th, 1876, more than twenty-two years, which would make in all 176 per cent., which, if applied to the whole three hundred thousand dollars of warrants, would involve a liability of huge proportions; the complainant nowhere asks that the city be deereed the debtor of the warrants at all, but only that it might be made to account for such taxes as it should account for, and the sum thereof, when ascertained, applied to the payment of the warrants; it will be noted that the statute of 1876, under which the contract was made and the warrants issued, provided nothing as to the payment of interest, nor did the act of sale, passed in pursuance thereof; it is true that the former provided that the warrants "shall be issued in the same form and manner as those heretofore issued to the transferee of said company under Act No. 30, of the acts of 1871, for work done;" and that the latter act provides, that the warrants, after being issued, if not paid when presented, shall bear interest at eight per cent. per annum until paid, but this clause of the act of 1871 in no way enters into the "form and manner"

of the issue of the warrants, which was all that was intended in common between the warrants issued for work done, and those for the price of the sale.

In a cause depending upon complicated issues of law and fact, and fraught with consequences so grave as the instant case, every matter of defense should be examined and weighed with the greatest care; it will be found, however, that the opinion of the Court of Appeals contains no syllable of reference to a plea of defendant which, if well made, would save it from liability; the plea is that of *res adjudicata*, extending to every form of relief sought by the bill; this plea, based upon the finding of this Honorable Court in Peake vs. New Orleans, No. 852 of the October term of 1890, and reported in the 139th United States, page 342, is one phase of the present application which, it is deemed, specially addresses itself to the favorable consideration of the court, interested as it is in the correct construction and proper application of its opinions, and in that uniformity which is a paramount necessity in jurisprudence.

The opinion of the court *a qua*, as is endeavored to be shown further along, has, as its fundamental thought, certain principles which this court is supposed to have announced in Warner vs. New Orleans, 167 U. S. 467; it is respectfully urged that a comparison of the opinion in that case with that of the Court of Appeals in the present case, will reveal that the former has been wholly misconstrued and misapplied.

Addressing itself to the highest source of relief, and basing its prayer upon such considerations as, it is hoped, may control your Honors' judgment, petitioner, whose case has never been before this tribunal in such form as that the justice of its position could be adequately perceived, craves attention to its complaint against what is believed to be an unjust judgment of the Court of Appeals.

In the allowance or refusal of writs of *certiorari*, this court is vested with, and has constantly exercised, a very extensive discretion; it is bound by no rules save those of conscience, and an enlightened and humane administration of justice; the writ is issued whenever in the view of the court, circumstances imperatively demand it, as, at common law, to correct excesses of jurisdiction and in furtherance of justice; *in re.* Chetwood, 165 U. S. 461; it has been issued to avoid conflict of decision between two, or more courts of appeal, or between the courts of appeal and the courts of a state; Forsyth vs. Hammond, 166 U. S. 515; it may issue where a circuit court of appeals in one circuit has given a different decision from a circuit court of appeals in another circuit, under the same conditions; the act of congress makes provision for such supervision of the inferior federal courts by the Supreme Court, as will tend to avert diversity of judgment and guard against any inadvertance of conclusion, in controversies involv-

ing weighty and serious matters; this, in the interest of jurisprudence and uniformity of decision; authorities: *in re.* Woods, 143 U. S. 206; Law Ow Bew vs. United States, 144 U. S. 58; American Construction Company vs. Jacksonville Roadway, 148 U. S. 383.

The writ of *certiorari* has been allowed in a case where a decision of the Supreme Court has been misconstrued, or misapplied, by a circuit court; Law Ow Bew, 141 U. S. 587; same case, 144 U. S. 58.

The question at what stage of the proceeding, and under what circumstances, the case shall be required by *certiorari* to be sent up for review, is left to the discretion of the court, as the exigencies of each case may require; American Construction Company vs. Jacksonville Railway, 148 U. S. 385; the writ may issue after a decree of the district or circuit courts, dismissing a libel, has been reversed, and the case remanded to the circuit court to assess the damage, the final decree of that court for a specific sum, and a second appeal to the Court of Appeals; under these conditions, the writ brought up the whole case for review; Panama Railroad vs. Napier Shipping Company, 136 U. S. 280.

It has been said that that portion of section 6 of the act of 1891, giving the remedy of *certiorari*, applied to every case in which, but for it the decision of the Court of Appeals would be final, and gives the Supreme Court the same authority over the case as it would have on appeal or writ of error; that the power was not affected by the condition of the case as it existed in the Court of Appeals; that it might be exercised before or after any decision of that court and irrespective of any ruling or determination therein; Forsyth vs. Hammond, 166 U. S. 506-512; so long as the transcript of the record of the Circuit Court, is in the Circuit Court of Appeals, the fact that a mandate from it has gone down to the Circuit Court, does not affect the right of the Supreme Court to issue a writ of *certiorari* to the Court of Appeals to bring up the record; the writ is in time if applied for at the next term and within a year after the original decree; "The Conquerer," 166 U. S. 110.

The effect of these authorities may be summarized in the proposition, that the court may exercise its supervisory jurisdiction to correct manifest errors, to prevent a denial of justice, or to revise decrees, whenever, in its discretion, it is deemed proper to do so, in the interest of justice; and this may be done at whatever stage the case may have reached in the Court of Appeals, either before or after the decision, at any time during one year from the decree, provided this be not beyond the next ensuing term of the Supreme Court.

The principal grounds upon which this application is based are that the Court of Appeals has misconstrued and misapplied a decision of this court, Warner vs. New Orleans, 167 U. S. 347; that it has failed to give not only the proper but any construction and effect at all, to

the opinion of your Honors in Peake vs. New Orleans, 139 U. S. 342, in its failure to sustain, or even mention in its opinion, the plea of *res adjudicata*, based upon the decree in that case; subordinate to these considerations there are others, some springing therefrom, and others independent and substantive grounds of relief.

The case, in its public aspect, is a subject of large and important interest to the inhabitants of one of the largest cities of the Union, and its final determination is awaited with anxiety by many thousands of persons who will be subject to its effect; it is hoped that this court will see the way clear for the exercise of its supervisory jurisdiction invoked by defendant. The petitioner is the more earnest in this hope by its knowledge, that the final determination by this court of a controversy which has been pending for many years, will be respected and cheerfully acquiesced in, by reason of the respect for, and confidence reposed in this tribunal by all good citizens.

The grounds upon which the petitioner has main reliance are that the decision of this court in 167 U. S. has been erroneously construed by the Court of Appeals, as decisive of many important issues in the present case; that the defense of *res adjudicata* pleaded by defendant, is not mentioned in the opinion of the court, and that the city should not be cast until all its defenses have been considered and overruled; subordinately, that the conclusions of the Court of Appeals, as to the liability of defendant, are totally unfounded; for instance, no effect whatever has been given to the constitutional amendment of 1874, or, to be more accurate, it has been given an effect, the reverse of what it was designed to have, and in violation of its very terms; that the four pleas of prescription, each applying to a different phase of the controversy and governed by considerations widely different, have been disposed of by the lower court in bulk, by the single finding that the city, as a trustee, is incompetent to raise them.

The slightest examination of the finding of this court in Warner vs. New Orleans, 167 U. S. 467, discloses what is as plain as anything can be made to appear, namely, that the court had before it two questions, and no others, namely: Was the city estopped to plead its bond issue in discharge of its asserted liability herein, and second: Whether or not the present case was covered by that of Peake in 139 U. S.?

It is evident by a glance at the opinion of the Court of Appeals, though not expressly so declared, that the court conceived itself bound against defendant on the whole case, by what was said when it was before this court on the certified questions; the opening sentence of the opinion is that "As to nearly all of these defenses, we might well rest our decision in this case on the opinion of the Supreme Court, expressed in its answer to the certified questions;" as a matter of fact, no single defense set up by the answer, save that based upon the bond issue, had made its appearance in the case, as a matter for con-

sideration, until set up in the answer; it is true that in the demurrer of defendant, the case of Peake was pleaded as *res adjudicata;* but considering that this defense was not properly set up in the demurrer, for the reason that it required evidence to support it, it is seen at once that any claim that it was ever considered at all, is gratuitous; it is, therefore, perfectly correct to say that instead of the court being able, if it saw fit, to dispose of all of the defense which appear in the answer, by resting its opinion upon what was said by this court in answer to the certified question, the fact is, that the defense based upon the bond issue was the only one which had ever been submitted to, and received consideration.

It may be inquired, to what purpose the bond issue is set up in the answer as a discharge from liability, after it having been held by your Honors that it could not be considered as a defense; but this is readily explained; the question submitted on this branch of the case was, whether *under the case stated by the bill*, the city was estopped, to set up the issue of its bonds as a discharge of liability; and, in deciding this question, your Honors said (167 U. S. 475), that, in order to a full understanding of the question to be answered, a review of the facts was essential; and that, for the facts, you would look simply to the statement prepared by the Court of Appeals, and not to the bill and exhibits, copies of which were ordered by the Court of Appeals to be sent you; it will be noted that the conditions upon which the question was to be decided, were specified by the latter, as the facts stated in the bill, while this court declined to examine the bill for this purpose, but confined itself to the statement of the Court of Appeals; neither by the bill, nor by the statement, did it appear that Van Norden himself, or parties to whom he had transferred drainage warrants, or his employees, received the whole of the bond issue in payment of drainage warrants; and that, hence, he was the recipient of all the benefits thereunder; it appeared from the bill that, at the time the bonds were exchanged for warrants, the entire drainage fund outstanding and uncollected was, in round numbers, $1,400,000, and that, by issuing these bonds for an amount in excess of $1,600,000, which were received by the warrant holders at 90 cents on the dollar, that the city had at least put into the fund the whole of it that could have been realized, if every dollar had been collected and paid over to Van Norden; your Honors have said in the Peake case, 139 United States, page 359, that, when the city thus paid this amount into the drainage fund, that as she had no power to make donations, the payment must, in equity, be treated as a discharge of obligations, if there were any; in answer to the certified questions submitted to this Court, it found a difference between the work or construction warrants involved in the Peake case, and the purchase warrants involved in the present case, and held that the city

could not be permitted to destroy a fund against which she had drawn her warrants in payment of the purchase price of property, which would result from her pleading that she was no longer indebted to the fund by reason of said payment made before the purchase warrants were issued; had the bonds been received by others than Van Norden, or those holding under him, the case would be quite different from what it is in fact, namely: that Van Norden himself, and other holders of warrants received from him, were the beneficiaries of the city's payment; it is clear that if the city be not allowed credit for the drainage warrants that were retired by her bonds, and at the same time be made responsible for the entire fund, as claimed by the bill, that the taxes have been increased by $1,600.00 over what they were ever contemplated to be, by the laws under which they were levied; if Van Norden, or, what is the same thing, persons who had acquired warrants from him, be permitted to receive the fruits of the city's bond issue, and at the same time hold the latter responsible for the balance of the original fund unpaid and uncollected, he would be left in the attitude of receiving, the bonds as a mere gratuity, and at the same time exacting from the city its full measure of asserted responsibility; if it be said that the city by drawing its purchase warrants against the fund, must be considered as affirming the existence of that fund, the answer is, that Van Norden knew precisely what the fund was; and if the city's asserted liability for assessment on streets, public squares and property of a like character were thus paid and discharged, and he was left with the assessment against private property alone to pay his warrants, it would be only a repayment to the city of less than one-half the amount of the bonds upon which it was liable and paid, and the proceeds of which went into the pockets of Van Norden himself.

Proceeding, however, the opinion which is marked by a frequent reliance on estoppels, goes on to say that the city's claim that she is not bound by the assessments and judgments against herself, as *quasi* owner of streets and other public places, on the ground that such assessments and judgments should be considered void *ab initio*, for the reason that public property is exempt from taxation, finds that the city, under the principles laid down by your Honors in answer to the certified questions, was estopped to deny their existence and validity, to the same extent that it is estopped from setting up its bond issue as a discharge of its general liability as trustee, with reference to the fund; the court, however, adds, that independent of estoppel, the authorities *seem* to affirm a liability under conditions surrounding the city in the present case; with regard to the estoppel, your Honors have said nothing as to how far the city was bound as to the particular assessments composing the fund; all that you have said is, that she could not impair that fund, whatever it might be, by an allowance of the

bond issue as a credit against it; nothing can be found in your opinion which declares that the assessments on streets and public squares are valid; it is difficult to understand the application in this regard, of the court's answer to the certified questions; the *seeming* affirmation of the city's liability given by the authorities brought in to support the theory of estoppel, to invite confidence, should have been reasonably supported, at least, by an asserted similarity between the statutes under consideration in the cases relied on, and those involved here; the acts of 1858, 1859 and 1861, bear intrinsic and conclusive evidence, that private property alone was intended to be assessed.

For instance, by section 7 of the act of 1858, directing how the boards shall proceed, they are directed to make a plan designating the limits of the section to be drained; the subdivisions of the property therein contained, and the names of the proprietors; after depositing this plan in the mortgage office, and advertising such fact, the commissioners are directed to apply by petition to one of the district courts of New Orleans for that part of the district lying within that parish, and after the observance of certain forms and delays, the court is to decree that each portion of property situated within the limits, should be subject to a first mortgage, lien and privilege; this clearly contemplates only such property as may be susceptible of mortgage or privilege, which would not include public property; should there be any doubt of this, it is cleared by the further provision of the section, that the drainage mortgage should take precedence over all other mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial; in what sense could these mortgages be understood, as applied to public property? That private property alone was intended to be assessed is declared by the precedence which is given to the drainage mortgage over the other kinds of mortgage named, which could only be applied to private property; for instance, a tacit mortgage is that which a wife enjoyed on the property of her husband prior to the adoption of the constitution of 1868; a conventional mortgage is one created by contract between one person and another; a legal mortgage is one which results from the registry of a judgment in favor of one person against another; public property is not susceptible of being affected by any of the mortgages named, and the kind of property to be affected by the drainage judgments is the same kind, and no other, than that which the several species of mortgage named could encumber, that is, property the title to which is vested in private persons.

By section 9, on non-payment of the assessment, judgment could be recovered for the same, and the land assessed be sold; and the board was authorized to purchase, hold and dispose of the same for the benefit of the district; this clearly shows that the kind of property out of which the taxes was to be collected was one which could be

acquired by a third party, or by the board itself, or, in other words, property which could be bought and sold by the owner; a seizure and sale of property by judicial process is only exercising *sub modo*, the right that the debtor himself would have to sell it; in the absence of an owner with power to dispose of the property, as where the title is in the public or all the people, there can be no seizure and sale for the collection of the tax; property out of commerce, not susceptible of alienation, was not in view by the framers of the act.

The only reference to streets, etc., in connection with the drainage scheme is found in section 8 of act 191 of 1859, which provides that the board shall have access to, and the right of copying, any plan or parts of plans of the city in the possession of the council, or any officer thereof, which is to be certified by such custodian to be a correct copy, the same to include streets, etc., or any portion or section thereof to be drained, according to the provisions of that act, or the act of 1858; this section purports to do nothing more, than to secure to the board copies of any city plans that might be needed in the discharge of their duties; the direction is that the plan shall include the streets of any portion or section which is to be drained; the direction that the copy shall include the streets or any part of the city to be drained, is not a declaration that the streets are to be assessed for drainage; it was merely to make sure that the board would obtain complete and intelligible plans of any part of the city they might wish, and that the streets were to be delineated thereon, in order to the better understanding of the plan; it would be strange that, after the voluminous provision of the act of 1858, which contains thirteen sections, covering something more than five pages, it should have thus far remained silent as to the liability of the streets for assessments, and that such liability should be fixed in three lines of the concluding section of the act of 1859; and then only by an inference which narrowly escapes being a conjectural; it is incredible that so large an item of revenue should be left to depend upon so frail a title; all presumptions would be against the purpose of making such property liable to assessment, to remove which would require language of unmistakable meaning; as plain as any fact can be made to appear, the section intended nothing more than to secure to the board the right to have copies of the plans so made that the streets would appear thereon; there is no room for supposing that the copies of the plans so furnished were to be the basis of the assessment; it was only for the use of the board for any purpose which it might serve, as, for instance, to show the boundaries by streets of the property to be assessed.

Act 57, of 1861, however, removes all doubt as to the nonliability of streets, etc., to assessments; it declares that the amount of the assessment fixed by the board to be paid yearly by the owner or

owners of the lands within the district, for the purpose of the act, shall be exhibited upon a tableau, upon which the property assessed shall be set forth, with the names of the owners, and, as if to emphasize the intention that only such property as was susceptible of ownership by a definite person was contemplated, it is further provided, that if the owners were unknown, the assessment rolls should state that they are unknown; a petition should be filed praying for an order that all persons whom it may concern show cause, in thirty days, why the roll should not be homologated, and that after the publication of said notice, on motion of counsel for the board, the court should homologate the rolls, which should be a judgment against the property assessed, and *the owners thereof*, on which *execution might issue*, as on judgments rendered *in the ordinary mode of the proceeding*; this again emphasizes the fact that the only property entitled to be reached by the assessments was property *susceptible of alienation*, and which was *liable to seizure by the sheriff*, processes altogether unknown and impossible as regards streets, squares, etc.

The act of 1858, in all of its recitals, negatives the idea that public property was in contemplation; it directs that all the subdivisions of property, with the name of the owners, shall appear by the plan; a street has no subdivisions, and the city is not the owner, but is only an administrator of public property for the benefit of the people; significance is given to the fact that private property alone was intended to be assessed, by the requirement, that where the owner is unknown, that fact should be so stated; private ownership is always found in association with the property intended to be charged; the further provision that the recorder of mortgages should report the drainage lien, privilege and mortgage, as taking precedence over all other mortgages, legal, conventional and judicial, affirms that the drainage encumbrance should extend only to such property as is susceptible of the mortgages described; and public property is not within this category; the act of 1861, providing that the drainage tax should be collected on execution as in ordinary cases, would necessarily limit the enforcement of the tax to such property as was liable to seizure and sale by the sheriff; which, of course, would not comprehend the streets, squares and property of a like character.

Streets and public squares are "public things," and are for the common use of the city. Revised Civil Code, article 454.

The drainage taxes are local assessments, which are a peculiar species of taxation; they differ from general taxes in the respect that the former are levied without any assurance that the taxpayer will be benefited, while the latter are made upon the assumption that a portion of the community is to be peculiarly benefited in the enhancement of the value of property, specially situated as regards the contemplated improvement.

Cooley on Taxation, p. 606, et seq.

Desty on Taxation, Sec. 59, pp. 281-285.

Where there is no peculiar benefit there is no liability for the tax.

Desty on Taxation, p. 285.

State vs. Clinton, 26th An., p. 561.

That the statutes of 1858, 1859 and 1861 did not have in contemplation public property, such as streets, squares, etc., as subjects of assessments, is manifest from the terms of the acts themselves; the assessments were to be made against the property and the owners thereof; the city is not the owner of the streets and squares; they belong in common to all the inhabitants of the municipality. Revised Civil Code, article 458; the city has no relation to them except as an administrator, with the right to regulate their use.

14th La. An. 842, 82 ;

12th La. An. 747;

32d La. An. 915:

37th La. An. 67.

The city not being the owner of the property in question, in no event could be held liable for the tax; the statutes did not intend that any assessments should be made against streets or public squares, and the commissioners in so doing were in excess of their authority, as the tax was to be levied against property and its owners; the title of ownership was necessary in order to make any person liable to the charge; property, the fee of which was not in any person, natural or artificial, known or unknown, in which category streets and public squares would be included, was evidently not in contemplation as subject to assessment, for the terms of the statute, fixing the liability upon the *property and the owner*, in the order named, may reasonably be deemed to have intended, that for the collection of the tax recourse should be restricted first to the property, and afterwards to the owner, in the event that the assessment was not collected in full out of the former; the justification of the tax being the supposed benefit conferred upon the property by the increase of its value, the suggestion naturally arises that the collection of the tax is primarily confined to the property which is intended to be improved; it *could* be, for such cases are disclosed here by the evidence, that the entire property might be taken for the tax, and leave a balance unpaid, that is to say, the owner would have lost his property altogether, and still be in debt; on the other hand, the sale of the property, and such cases are also disclosed by the record, might pay the tax many times over, in which event there would be no necessity of recourse against the owner; a local assessment being in its essence a tax on land, and not against persons, is naturally payable first from the property itself, and the personal liability, if there be any, should be asserted only for any balance re-

maining unpaid after the property has been exhausted; these considerations tend conclusively to the result that there is no personal liability, or any right to take execution against the owner, until the property is first exhausted, and then only for unpaid balance.

Applying this to the asserted liability of the city as a debtor for the taxes on streets and public squares, how would the city stand in the issuance of an execution for the sale of its streets? What would be the effect of a suit for a mandamus to compel the city to pursue such a course? How would result the efforts of the warrant holders themselves, if they were in a position so to do, to sell the streets and public squares for the payment of the taxes? Going further, imagine a number of drainage tax judgments, and every street in the city named upon the assessment rolls put under seizure by the sheriff, and the farce of its advertisement and adjudication to a purchaser persisted in, what kind of a title would such purchaser receive, and what manner of possession would the sheriff give under his adjudication?

Referring, again, to the rule that local assessments are upheld on the ground that they confer a peculiar and special benefit upon certain property, in which other property does not participate, as regards public streets and public squares, of which the entire people have the free use and enjoyment, what special benefit would they receive from the drainage apart from other property?

They are not in commerce, and have no value which can be measured in money; they belong to no one person, not even to the city herself, but are the property of every inhabitant. See Neenan vs. Smith, 50th Mo. 525, 528.

Hartford vs. West Middle States, 45th Conn. 462.

The city in no event could be held as a trustee of the assessments and judgments against herself; as to these she was a debtor and not a trustee; besides which, it will be seen that the court has dealt with the city's defense as to these assessments, as though it was based simply upon the exemption from taxation of public property, in the general sense.

It may be premised that the defense set up is not simply that the public property in question is exempt from taxation, but also that it was not intended by the act of 1858 to be assessed for drainage taxes; your Honors will observe that this part of the city's defense, on this part of the case, is not noticed in the opinion.

The claim that the city is a trustee, is based upon the provisions of Act No. 30, of 1871, and more particularly upon those of section 9 of that act.

Defendant insists that by that statute, it is not made a trustee of the assessments against public property; that no such intention is expressed or implied in any language that it contains; on the contrary, from the circumstance that it is made a trustee as to assessments

against private property, and no mention is made of those against public property, its trusteeship as to the latter is completely negatived; and, further, that the failure to mention assessments against streets, etc., either expressly or by inference, may be evidence that they were deemed invalid by the legislature; on the other hand, it is clear, that the assessments turned over to the city were those against private owners alone; this is shown by the duties imposed upon the city; the act says, section 9, page 78, that the Board of Administrators "be and are hereby authorized and directed to collect from the *holders of the property* within said districts, the balance due on the assessments, as shown by the books of the first, second and third drainage districts, under the acts of March 15th, 1858, and March 17th, 1859, and the several acts supplementary and amendatory thereto, which *said assessments* are hereby confirmed and made exigible." Italics are ours.

The same section says, page 77, that the Board of Drainage Commissioners "shall transfer to the Board of Administrators of New Orleans, all moneys, assessments, and claims for drainage in their hands or under their control, * * * a true statement of the claims of said Drainage Commissioners against the city, to be adjudicated and settled out of any money *collected* by the city."

The claim that the assessments against the city were included in the assessments placed under the control of the board is seen to be entirely without force, when, reading further, it is ascertained, what the city was directed to do with these assessments, namely, to collect them from *holders of property* within the districts, language, which by no construction could mean anything else, than that the assessments so turned over, were those against the owners of private property, from whom the city was to make collections; the city surely was not to collect from herself as a holder of property; for a debtor to collect from himself what is due to his creditor, and pay it over to the latter, is an incongruity, the imagination is unable to picture; if this mode of thought were pursued with reference to the holders of private property, the act would have declared it their duty to collect from themselves and pay over to the city; nor is the "true statement of the claims of said Drainage Commissioners against the city, to be adjudicated and settled out of money collected by the city," a description which would comprehend the assessments against the city, as included in what the board was to receive; the assessments, had prior to 1871, passed into the judgments so strongly relied upon by complainant; and hence, there was nothing to be adjudicated upon; and in any event, the assessment on streets was not to be paid out of money collected by the city from any one, but out of its own hands.

It is no answer to say that the transfer was for the purpose of collecting these amounts; this is limited to assessments against the holders of property, in which category the city could by no interpretation be

included; nothing could be accomplished for the warrant holders by making the city transferee of the judgments against herself; it was indicated in the clearest manner that the assessments against public property were not contemplated by the act of 1871; whether because they were regarded as invalid, or for any other reason, need not be determined; the exigencies of defendant's case are sufficiently met in this regard, if the fact be, that the assessments against streets, squares and property of a like character were not, as complainant insists, and the Court of Appeals declares, confirmed and made exigible by the act here insisted upon by defendant of 1871; the construction of that statute harmonizes with its argument that the act of 1858 did not intend that such property should be assessed; that the act of the commissioners in placing it upon the rolls was arbitrary and without legal effect, and that the judgments of homologation all on their face purporting to be rendered in accordance with the statutes authorizing the assessments, could have no greater effect than the statutes and assessments themselves; there would be as much authority for the commissioners to have placed upon the rolls property situated outside of the drainage districts, as there would be to place thereon property within them, but not of the character which the statute intended to be assessed.

With regard to the declaration in the opinion, that the drawing of the warrants against the drainage fund, composed largely of these very assessments and judgments, operated as an estoppel to deny their own existence, it is respectfully submitted that it assumes against defendant the entire matter at issue; the warrants were drawn against the drainage taxes, and in no particular was it undertaken to define what they were, nor is there any fair implication as to what taxes composed the fund; to draw a warrant against drainage taxes, without specification as to the property which is assessed, and the persons who are involved therein, while it might assume the existence of a fund of some sort, leaves entirely at large any question as to whether assessments against public property formed any part thereof; the physical existence of certain rolls on which streets and like property were assessed, does not, in the faintest degree, import anything as to their legal effect, or that they had any; during the many years from 1858 to 1871, the city had not paid one dollar of these so-called assessments, and during that period the municipality had enjoyed prosperous times; no warrant holder ever attempted to enforce against her, any right based upon the city or the streets, being liable to drainage taxes; Van Norden himself, in 1872, instead of, by mandamus or other proceeding, attempting to realize from the city the large sums now imagined to be due for assessments on public property, and thus realizing in cash to the extent thereof, contented himself with obtaining relief by the city's bonds, which, by the act under which they

were issued, he was required to take at a discount; instead of these assessments being confirmed by the act of 1871, as far as any fact can be declared and acquiesced in by silence and inaction, the non-liability of the city was established, not only by its own conduct, but by that of every holder of drainage warrants; if, in 1876, as is declared in the bill, with reference to the failure of the city to prosecute the work of drainage, as shown by the evidence of Brown to be due to the lack of means, it had an unlimited power of taxation, it is extraordinary that Van Norden, who at that time was a large holder, both of work and purchase warrants, abstained, for the purpose of paying the judgments against her, from any attempt to enforce the exercise of his power, by appropriate legal proceedings.

The assumption in the opinion that the Supreme Court of Louisiana has held the city liable for assessments made on the area of streets, if scrutinized, is seen to be altogether unfounded in fact, so far as any application to the present case is concerned.

As to the first case cited, that of the Drainage Company, 11 An. 338, it may be premised by saying that the question of liability of streets, etc., to local assessment was not before the court, which, as to this question, decided nothing. But in order to be certain as to this point, it would be well to subject the opinion of the court in all its parts to the closest scrutiny.

The first point raised, was that the charter of the company was unconstitutional (see page 339), the claim of unconstitutionality being based upon several grounds set out in detail, the first of which, namely, that the charter imposed taxes upon a portion of the community only, for a work beneficial to the public at large, was sustained, and there the whole matter would have ended, had it not been that a rehearing was granted in the case.

On the rehearing the court held, first, that as the legislature had the power to drain the swamp in the rear of the city by its own agents, it had also the power to do it through the intervention of a company created for that purpose; second, that the charter of the company was not in violation of article 124 of the constitution of 1852, which provided that the citizens of New Orleans should have the right to appoint the several public officers necessary for the administration of the police of the city; third, that the mode of paying for the work done by the Drainage Company was not in violation of article 123 of the constitution of 1852, or of article 127 of the constitution of 1845, which provided that taxation should be equal and uniform throughout the state (see pages 372 and 373); fourth, that the charter of the company was not violative of article 105 of the constitution of 1852, so far as it provided that vested rights should not be divested, unless for the purposes of public utility, and for adequate compensation previously made; as to this point, however, the court took occasion to say (p. 373):

"We have not understood from counsel that there are any cases in which the property has not been so far benefited by the work done as to be increased in value more than the cost of the work assessed. Were not this the case, the property of each proprietor, to the extent of the difference between the increased value and the cost of the work assessed to him, would be taken for a purpose of public utility without adequate compensation previously made, and consequently there would be a violation of the provisions of article 105 of the constitution."

It is not proper here to observe that the principle thus announced by the court is identical with that declared by act 67 of 1877 (see page 106), attacked by complainant as being an impairment of the obligation of his contract; the act of 1877 says that the true intent and meaning of all drainage laws of this state where liens and privileges are recorded against the property requiring drainage, are that under the same no assessments or judgments can be collected until after there had been conferred upon the property such improvements as will effect drainage equal in value to the assessment exacted from the property; in his view the act of 1877 would have introduced no new element or principle by which complainant's rights were affected; the principle declared by the act of 1877 was announced by the Supreme Court in the Drainage Company's case in 1856, two years before the adoption of the first statute under which complainant asserts his rights.

Proceeding, however, with our effort to show that in the case discussed nothing was said as to the liability of streets and other places for the drainage assessments, the decree in favor of the company was attacked (p. 375), because the citation was by publication, and did not amount to a notice; the court held that the legislature could determine in what manner parties could be brought into court, and that such a notice was valid.

It was next contended that the estimate of the cost of the drainage was not in conformity with the charter, but this the court held was cured by the judgment, and had been acquiesced in by the parties, who had daily seen the work upon the land in progress, and had made no objection or remonstrance.

It was further contended that the company could not recover for any work done on section 2 after the first of January, 1849, the date when it should have been completed; this contention was rejected by the court, which affirmed the judgment of the district court denying the company compensation for work done after a subsequent date, that is, May 10th, 1849.

The next contention concerned the matter of the allowance of interest, as to which the judgment of the lower court was amended; the

homologation of the tableau was opposed again (p. 376) on the ground that the amount should be reduced by reason of the delays of the company in prosecuting the work; this contention was rejected.

It was next contended unsuccessfully that the work as regards section 2 of the drainage area was not promptly done, in that said section was not isolated from other part of the city.

Further grounds of opposition concerning the expenses of cutting the wood and timber standing on section 2, the manner of the charging of interest, and the mode of assessment, were all disposed of by affirming the action of the district court.

We have been at pains to go through the whole of this decision, in order that the minor and incidental references to the matter of streets was the matter dealt with by the court after it had disposed of all the oppostions before it. It does not appear that the assessment against streets was any question put at issue by the pleadings of any party before the court; certainly, the city was not there, as it is here, opposing the inclusion of the streets in the land to be assessed, and the only reference to the subject of streets is found in the conclusion of the court's comment upon one of the effects of assessing lands, of no value, at the same rate as those of great value; one feature of such a method, mention by the court in the concluding paragraph of its opinion, is the imposing upon the city, for the streets, a large portion of the expense; it is obvious that this random expression, by which it is intended only to describe the consequence, if a certain view were taken of the case, and appearing in a mere fragment of the opinion, not adjudicating upon the claims of any person before the court, in any event not upon the city herself, cannot be considered as an authority of even the slightest weight in support of the proposition that the streets were liable to assessment. The subject is spoken of only as a consideration supporting on equitable grounds the assessment in the same manner, namely, by the superficial foot, of all property, whatever might be the differences in value, it was put by the court only as an illustration to show the justice of such a mode of assessment, and obviously its correctness was not questioned and decided, but, on the contrary, assumed.

Nor does the case of Marqueze vs. The City of New Orleans, 13th A. 319, contribute in the slightest degree to the solution of the issue, whether or not the streets and public squares were liable to assessments under the drainage laws in question here; the liability of the city in that case did not depend upon the liability of such property to assessment, but grew out of the express contract made by the city with Marqueze to level, grade and shell Claiborne street, from St. Bernard avenue to Elysian Fields street, on one side of which was a middle or neutral ground which did not belong to any of the front proprietors; in payment of the entire work, the city delivered

to Marqueze, the contractor, bills against the property-owners on the side of Claiborne street opposite the neutral ground, which included the entire cost of the shelling; by section 119 of the city's charter, however, the owners of real estate could only be made to pay the cost of street paving when they owned the property fronting on both sides of the pavement; the effort of the city to throw the entire cost of the paving upon the front proprietors who owned property only on one side of the street was an attempt to force upon them the liability which the city charter said they should not bear; the city itself having made the contract with Marqueze, and in payment therefor having given him an order on the property-holders, which to the extent of one-half was not enforceable, it was required to make good the price at which it had contracted Marqueze should receive for his work; the city could be held liable, irrespective of its alleged ownership of the neutral ground; the property-holder not being the owner of this portion could not be called upon to pay as such owners; the Supreme Court must not be understood as declaring what is denied by the Civil Code, and by numerous decisions rendered prior to the Marqueze case, that the city is the owner of a public street or public square; on the contrary, this is expressly negatived by the language of the court, which is found on page 320, as follows:

"The city is obliged to make and pay for one-half of the paving in the case at bar, not only from the effect of section 19 of the city charter, but also because the middle ground on Claiborne street is the property of the city, and intended and dedicated as a public promenade, for the public use and enjoyment."

It is thus that the city's relation to the property is defined; if the property is dedicated for public use and enjoyment the city cannot, in the sense of the drainage acts of 1858 and 1859, be its owner, because over such she has no power of alienation, nor can she subject it to privilege or mortgage.

It must not be understood that the imposing upon the city of the liability for the shelling in the Marqueze case means that she must pay the assessments upon the streets in the present case; in the former case her relation to Marqueze was one growing out of a contract, while here there is no contract between herself and the Boards of Commissioners who levied the assessments upon the streets; under the statutes at issue here, there could be no assessment to affect any person, directly or remotely, except the owner of the property, and so far as this term is used in the opinion of the court in the Marqueze case, it is clearly not in the same sense in which it is found in the statutes of 1858, 1859 and 1861; the context of the Marqueze decision shows clearly the meaning of the city's ownership therein spoken of; it was an ownership of property which was dedicated to the public use, which

is the same kind of ownership described by the articles of the Code and the decisions, which class the city not as owner, but simply as the administrator of such property.

It will be observed that of the four members of the court but two concurred in the opinion; Mr. Justice Buchanan, having an interest in the suit, took no part in the decision, while Mr. Justice Spofford dissented from that part of the opinion which gave countenance to the claim that the city was the owner of the neutral ground, and which subjected the latter to any part of the cost of paving; Mr. Justice Spofford concurs in the decree on the ground that the city warranted the validity of the claims against private owners given to the contractor, and that the contractor having by judgment been defeated in the collection of his claims, the city was liable to him for the same; the decision in the Marqueze case being rendered by only two judges out of four, one or the other two taking no part in the case, and the other having dissented from the views contended for by complainant, is but feeble if any authority in favor of the proposition that the city is the owner of the street or public place, opposed as it is to the textual provisions of the Civil Code and the general jurisprudence of the state.

The case of Correjolles vs. Succession of Foucher, 26th An. 362, so far as the facts are concerned, is similar to the Marqueze case, except that the defendant's attorney in that case, the Hon. Edward Bermudez, late Chief Justice of the Supreme Court of the State of Louisiana, did not go the length of claiming that the title to the neutral ground on St. Charles street was in the city, but contented himself with the claim that it was neither in the Carrollton Railroad Company or *the public;* it will be noted in the 26th Annual case, while it is declared that the case is controlled by the Marqueze case, in construing the latter, the court says that it was there held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and the city was bound to bear one-half of the expense of constructing a road on the north side of Claiborne street; to say that the neutral ground belonged to the city as a *locus publicus* is to say that it did not belong to the city in ownership, of which a *locus publicus* is not susceptible; as to public places the city has simply a right of administration, the fee being in the people; we are, therefore, verified by the 26th Annual case in our construction of the Marqueze case to the effect that it was not intended by the latter to say that the neutral ground on Claiborne street was susceptible of ownership by the city; the determination of the Marqueze case being that the ground belonged to the city and was dedicated to the public use and enjoyment, terms which when construed together mean nothing more than the definition of the city's possession in regard to such property under the articles of the Code; the 26th Annual case brings out conspicuously this feature of the

Marqueze case, where it declares that the middle ground of Claiborne street belonged to the city as a *locus publicus*, which means that the city was its owner in the narrow and restricted sense of an administrator for the public good and use.

The constitutional amendment of 1874 (see acts 1869, page 1), prohibited the city from increasing its debt in any manner or in any form or under any pretext after the first of January, 1875; it forbade the drawing of any warrant or other order for the payment of money, except against cash actually in the treasury; it contained a proviso that the amendment should not be so construed as to prevent the drawing of drainage warrants in favor of the canal company or its assigns for work done under Act No. 30, of 1871, payable exclusively out of drainage taxes; it is difficult to conceive by what exercise of ingenuity the scope and effect of the amendment could be misinterpreted; its evident purpose was to prevent the city from creating any debt, bonded or floating, in addition to that already existing on the 1st of January, 1875; it absolutely forbade the drawing of any warrant except such as could be immediately paid by cash on hand for that purpose, and the permission to draw warrants payable out of the drainage tax alone only brings in bolder relief the inhibition against the drawing of any warrant, or order for the payment of money which, in form and effect, was payable otherwise than out of the cash on hand, or out of the drainage tax.

The amendment as interpreted by the Court of Appeals has furnished an authority, instead of announcing a prohibition against, the city incurring the additional debt; it may be added, in passing, that the claim that defendant's case has not been fully understood by the Court of Appeals is fully vindicated by its remarks in reference to this part of it; it is said: "It would seem that the authority to issue warrants against the drainage fund after that date necessarily implied an affirmation of the right of the city to the completion of the drainage work then in progress, and imposed a corresponding duty on the city to collect and apply the drainage assessments to the payment of the warrants;" when it is considered that the "work then in progress" was being conducted, not by the city, but by Van Norden, as transferee of the company, and the city was under no duty,—nay, had no right to carry on the work or to meddle with it in any manner at all, and she had no connection with the same until some two and a half years afterwards she took charge of it under the act of 1876, the failure of the defense to make the facts of its case appreciated by the court is lamentable indeed; the other inference of the court that the right to draw warrants imposed a corresponding duty to collect and apply all drainage assessments to the payment of the warrants is pregnant with the suggestion that it had no such duty to perform as to the assessment against itself on streets and other public property, since as to these

there was nobody to collect from, the city herself being a debtor, and her duty, if any at all, founded upon the assessments, being to pay and not to collect; in the language which follows, the court has disregarded all distinctions between assessments against private property, or the owners thereof, for which the city is said by the bill to be responsible by reason of her failure to collect, and the assessments against the city herself, as to which, at most, she is a debtor, and her duty simply to pay; the wide difference and important distinction between the status of each of these classes of taxes are completely annihilated by the court, when it says, in its remarks on the amendment of 1884, that "these taxes, being liabilities of the city, cannot by any cause or reason be included in the clause prohibiting the increase of the debt of the corporation without imputing to the authors of the constitution an intent to defraud those who might deal with her under the invitation of the constitution."

If the amendment has succeeded in making anything clear, it is that the drainage assessments there spoken of are not liabilities of the city; on its face, the language repels any such meaning or inference. The assessments against the city alone could by any possible construction be deemed liabilities of the city when the amendment was to go into effect; the assessments against private property were not and had never at any time been considered as liabilities of the city, but were obligations of private property, and of the owners thereof; the amendment, of course, did not obliterate any liability which the city was already bound to, but surely it could, in no event, convert an assessment against private property into obligations of the city; the so-called assessments on streets and squares, etc., as we have argued elsewhere, were never at any time binding upon the city and altogether without effect as being made without any authority of law; the intent of the constitutional amendment was that the city should not, by any process whatever, become a debtor of more than she owed on the first of January, 1875; therefore, this act of purchase in 1876 could not, in any of its results, whether by reason of misconduct on the part of the city or not, be made to assume any form by which the city, in consequence, would be a debtor of one dollar in excess of her indebtedness on January 1st, 1875; the ground upon which the city is said to be made liable herein is that she abandoned the work of drainage and neglected to collect the tax, but if the amendment be given its proper effect, the city could not, by such negative conduct or acts of omission or neglect, do that which she was forbidden to do in the most positive and solemn manner, she could clearly make no contract in violation of the amendment, and, hence, could not, by inaction, accomplish that which she was positively and directly forbidden to do.

Such limitations upon the power of a municipality to incur indebtedness have always been upheld and have never been disregarded upon the plea either of convenience or necessity.

The constitutional amendment of 1874 prohibited the city from adding to its debt under any pretext whatever. The prohibition is sweeping and extends to any increase of debt in any manner or in any form; it matters not how necessary the work of drainage may be or may have been considered. The purpose of the amendment was to strip the city of any discretion whatever as to the increase of its debt. The debt could not be augmented, however necessary in the city's judgment. Of all of this Van Norden had full notice when he sold to the city.

It matters not how great may be the necessity, real or apparent, for the city to incur debt beyond the constitutional limit, the prohibition, and not the necessity of the expense, controls. This is well settled by authority. A limitation on indebtedness imposed by constitution or charter extends to all forms of debt, bonded or floating, and embraces all transactions which may involve or affect indebtedness of any kind beyond the limit allowed.

In Prince vs. Quincy, 105 Illinois, 138, the city undertook to contract for the construction of water works for a sum which, added to its existing indebtedness, exceeded the constitutional limit of five per cent. on its taxable property. It was claimed that a water supply was a necessary requirement of the city, and its provision was an item of ordinary current expense incident to the city's power of government and administration. While the necessity for work was admittted, the court held the contract to be void, as beyond the constitutional power of the municipality. The court declared that the rule applied was well settled in Illinois and admitted of no exception, citing several instances in support of its conclusion.

In Sacket vs. New Albany, 88 Indiana, 473, under a constitutional provision, in all respects similar to that of Louisiana, limiting municipal indebtedness of municipal corporations to two per cent. upon its taxable property, recovery for the price of a system of fire alarm, the necessity and importance of which is readily seen, was denied on the ground that the contract, if permitted to stand, would create an indebtedness exceeding the limit. As in the case just cited, it was there contended that the contract should be upheld on the ground of the absolute requirement of a system of fire alarm for the protection of property, but this was found insufficient to sustain the contract, in view of the limitation of indebtedness.

In Valparaiso vs. Gardner, 97 Indiana, 1, under a similar provision of the constitution, a like rule was affirmed, although in the particular case the contract in question was held not to be a debt, and hence removed from the limitation of indebtedness.

In National Bank vs. Independent District of Marshall, 39th Iowa, 490, the contract of a school board for the construction of a school house, a purpose directly within the powers of the board and obviously a necessary object for the performance of its duties, was declared void for the reason that its payment would be in excess over and above the indebtedness permitted by the constitution.

In Davis vs. Des Moines, 71st Iowa, 501, a local assessment for the construction of a sewer was contested by a property owner on the ground that its cost would increse the city's debt, in violation of a constitutional provision by which it was limited to a certain amount. It was held that the assessment which was to be paid by the owners of the adjacent property was not a debt of the city, by reason of which it was not affected by the prohibition. On this ground the assessment was upheld, but the rule that all municipal indebtedness in excess of the constitutional limit was void, however necessary the public work for which it was contracted, was null and void, was declared.

This case is instructive in the present controversy. The drainage assessments as levied under the act of 1871 are fully recognized by the constitutional amendment of 1874. In this form they are not affected injuriously by the amendment; but any process by which they are to be converted into absolute debts of the city is in the teeth of the amendment, by which the city is prohibited from increasing her debt after the 1st of January, 1875, *in any form or in any manner or under any pretext.* In the face of such absolute injunction, the failure of the city to complete the work of drainage and collect the assessments could not make it the debtor of the warrants sued upon. The amendment intended that not one dollar should be added to the city's debt no matter what the pretense. It would amount to little, if mere neglect or failure of duty could bring about the very result which it was the purpose of the amendment to make impossible.

In Scott vs. Davenport, 34 Iowa, 208, the city was expressly authorized by its charter to construct a water works plant. Here, too, the necessity of a water supply was imperative; yet, notwithstanding the express charter authority and the necessity of the work, the contract was annulled on the ground that it created an excess of indebtedness over and above the constitutional limit.

In Council Bluffs vs. Stewart, 51 Iowa, 385, proceedings for the opening of a street, the work to be paid for by an issue of bonds, were set aside on the ground that the bond issue would increase the municipal debt beyond the constitutional limit. The public requirements which necessitated the opening of the street were considered insufficient to remove the contract from the constitutional rule, the court holding that the limitation applied to all debts of every description, for whatsoever purpose contracted.

In the decisions mentioned there are cited many cases upon the question at issue, they are respectfully referred to the consideration of your Honors.

See also Read vs. Atlantic City, 49 N. J. L., 558.

In appeal of City of Erie, 91 Pennsylvania St., 398, a contract for the construction of a market house, a necessary adjunct of municipal government, was attacked on the ground that its price would add to the city's debt to an extent that would exceed the limit placed upon it by the constitution. The contract was held void on this ground.

The decision of the courts of last resort of Illinois, Iowa, New Jersey and Pennslyvania, above cited, are in full accord with the jurisprudence of this court upon the same subject.

In Buchanan vs. Litchfield, 102 U. S. 278, bonds were issued in payment for the erection of water works; the bond issue with the existing municipal indebtedness exceeded the constitutional limit of five per cent. upon the taxable property of the city. Upon this ground the bonds were held void.

In Litchfield vs. Ballou, 114 U. S. 190, the contractor who built the water works just mentioned, sued to recover the money expended in their construction. The bonds, as is seen, having been decreed invalid upon the same ground, namely, that the contract violated the constitutional limit of indebtedness, the relief sought was denied. The prime necessity of the work in question as a means of supplying the city's inhabitants with water was one of the conditions of the suit, but this in no respect hindered the court from maintaining the constitutional limitation of indebtedness.

In Doon Township vs. Cummings, 142 U. S. 366, bonds in excess of the constitutional limit were issued. They were, however, to be used in retiring previously existing debts, which were within the limit, and hence in the result there would have been no increase in the debt. This court held, however, that there would be an undoubted increase in the interval between the issue of the bonds and the taking up of the old debt, and this violation of the constitution, though temporary, and as the initial step towards paying a lawful debt, could not on that account be excused (page 372); the bonds were declared void.

The Supreme Court of Louisiana has had frequent occasion to construe and give effect to the constitutional amendment of 1874, and in every instance has maintained its most rigorous enforcement.

It has been said that this amendment "was a perfectly constitutional provision, operating *in future* only, and absolutely binding, not only upon the City of New Orleans, but on all persons dealing with the city. No clause or commentary can make its meaning more perspicuous. It rendered it impossible for the city, by any voluntary act, to increase her debt, in any manner, form, or under any pretext, and all persons were fully charged with notice that whatever services they

might render, and whatever supplies they might furnish, that they could never become creditors of the City of New Orleans, because she was incompetent to contract additional debt." Taxpayers' Association et al. vs. City of New Orleans, 33 Louisiana Annual, 571.

In another case the court says: "We have rigidly enforced the constitutional amendment of 1874 as to debts created after its passage." Taxpayers vs. New Orleans, 33 Louisiana Annual, 568; State *ex rel.* Marchand, 37 Louisiana Annual, 19 and 20.

See also State *ex rel.* Gaslight Company vs. City of New Orleans, 37 Louisiana Annual, 438, citing Eager vs. New Orleans, 36 Louisiana Annual, 937.

State *ex rel.* Wood, Board of Liquidation, 40 Louisiana Annual, 413.

The pleas of prescription, in so far as their discussion is concerned, were ignored by the Court of Appeals; as to the assessment against the city, which had been merged into judgments, the plea was unquestionably good; there were two classes of taxes for which the liability of the city is sought to be fixed; first, those against private property; and, second, those against streets, public squares and property of a like character; as to the first, from their origin they were charges against private property assessed and the owners thereof, they were not in any sense liabilities of the city; the contention of complainant is that the city has become liable for these assessments by reason of her failure to collect them and her abandonment of the drainage work; this failure and abandonment occurred in 1876, when the constitutional amendment was in force, which, by its very letter, was an insuperable obstacle to the city becoming the debtor of these assessments by any process whatsoever; the second class of assessments, those against public property, are charged against the city as the primary debtor.

In defense it is claimed that there was no authority under the act of 1858 for the making of these assessments; that, although, as a matter of fact, such property was listed by the commissioners, that this was a mere act of power, without warrant of law, and hence devoid of legal effect; it is argued, however, by the complainant, that this objection cannot now be made because the assessment rolls have been homologated,—have been merged into the judgments by which they were homologated, and any question as to their illegality has been thereby foreclosed; as to this, it may be said that the judgments could have no greater force than the statutes which they were rendered to carry into effect, for the purpose of execution by collection through the sheriff, of the assessments intended to be authorized; whatever the statutes mean, the judgments mean; the latter are interpreted and limited by the statutes, which declared the liability which the judgments were designed to fix; the soundness of this position is maintained by the

judgments themselves, which expressly declare that they are rendered in accordance with the acts of 1858 and 1861, by which reference the statutes are imported into the judgments as part thereof; and if there be doubt as to their meaning and effect, the judgments declaring that their purport and significance, are to be the same as the statutes in question, they are necessarily controlled and limited by the latter; the doings of the commissioners and the homologation extending no further that the authority derived from the statutes; hence, if the assessments on public property was beyond the power of the commissioners conferred by the act of 1858, the judgments did not, nor were they intended to enlarge the authority of the commissioners.

In the attempt to escape the effect of such interpretation of the laws as would make the assessments on streets, public squares, etc., null and void, by the claim that such question is closed by the judgments of homologation, the complainant falls into another difficulty, equally if not more serious.

If the decrees of homologation are judgments, so far as to close all matters of defense which might have been urged before they were rendered, it is impossible to save them from the effects of other rules applying to judgments; one of these is that established by article 3547 of the Revised Civil Code, by which judgments are prescribed in ten years, saving, however, to the judgment creditor or any other person interested in the judgment, by a timely suit, brought within ten years from its rendition, to save the judgment from prescription; this latter provision would do away with all pretense of the city utilizing its status as a so called trustee to allow the extinguishment by the lapse of time, of the judgments which its duty was to keep alive; aside from the consideration that a suit by the city against itself as a defendant, for the revival of a judgment against itself would be a startling anamoly, the remedy of the warrant-holders relying in part on these judgments for payment, was wholly within their own hands; as persons interested in the judgments they were, under article 3547, of the Revised Civil Code, authorized to have brought suits for revival of the judgments themselves; of course, possessing the merit of possibilty, while the process of the city suing herself would be difficult to conceive; if the judgments had, therefore, perished by the lapse of time, the responsibility lies not at the door of the city as is contended, but is chargeable to complainant or his assignor and his fellow warrant-holders.

This defense is disposed of by the Court of Appeals with the single remark that the act of 1876 created an express trust in the city, in which the city undertook as trustee to collect and apply the drainage assessments to the payment of the warrants; and that the statute of

limitation is not set in motion until the trustee has disavowed the trust, and notice of its repudiation had been brought home to the *cestui qui trust*.

When it is considered that the act of 1876 says nothing whatever as to what composed the drainage fund, whether it was assessments against private persons and property, or assessments against streets, public squares, etc., and the city or both, it is difficult to understand the assumption that the act made the city a trustee of all character of assessments; if any part thereof, as they then stood upon the books, were invalid in law, there was nothing in the act of 1876 which could make them valid; there is no suggestion that the act of 1876 was to have any curative effect, or to make valid that which was before invalid.

We have seen that by the act of 1871 there was turned over to the city and she was directed to collect only the assessments on private property, and it will be strange indeed if the act of 1876 was intended to so enlarge the city's responsibility as to charge her as trustee of the assessments against herself, and to have done so merely by implication.

And conceding, for the sake of argument, that the position of the court, altogether at variance with the law, is justified, its answer to this part of complainant's case would still perish when tested by its concluding portion, to the effect, that prescription is suspended until the trustee has disavowed his trust, and knowledge of such repudiation is brought home to the *cestui qui trust*.

The bill charges and the record shows that the work of drainage was abandoned in 1876, the effect of which, according to the bill, was to make the tax unenforceable; it would be a very violent presumption that such conduct by the city, attended with all the public notoriety surrounding a municipal act of such important and far reaching consequences, could have been done without coming to the knowledge of Van Norden, who had received three hundred thousand dollars of the warrants, to be paid out of the drainage taxes alone, which could not be collected unless the drainage system was completed.

To suppose that Van Norden, or the other warrant-holders, if, by that time, he had parted company with any of the warrants, would have been in ignorance of the conduct of the city, which is bitterly complained of in the bill, would be a severe tax upon credulity. This suit was instituted November 26th, 1894, about eighteen years after the city had ceased to prosecute the work of drainage, and consequently repudiated her trust, so called; the lapse of ten years alone would be sufficient to sustain the plea of prescription of the judgments against the city, even if she occupied the grotesque position assigned her by the Court of Appeals—that of trustee of a debt, if due at all, due by herself.

To sustain the imprescriptibility of the assessment judgments—and it is only against these, and not against those against private property, that the prescription of ten years is pleaded—the court cites the case of Southern Insurance Company vs. Pike, 32d Louisiana Annual, 1037; McKnight vs. Calhoun, 36th Louisiana Annual, 408; if there be any resemblance between these cases and the one at bar, or any analogy between the propositions therein involved, and those concerned here, it is not revealed by the most searching examination; the slighest examination of these authorities will make this clear.

Regarding the statement of the opinion that under Insurance Co. vs. Pike, 32 Louisiana Annual, 403, that the trust created by the act of sale was continuing and executory, and under it the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the warrants, it may be said that the authority of the Pike case, and the others cited, are not questioned, but they are altogether without application in the present instance; the city here does not plead prescription against her accountability as trustee of the drainage taxes due by private individuals; she claims that the judgments against herself have been extinguished by prescription; we have argued that as to these judgments she is not a trustee, but a debtor, and all debts are subject to the statute of limitation in this State; the Pike case touches no question bearing any resemblance to the one at issue; Pike took possession of all the books, accounts, assets and property of the Southern Insurance Company, with the obligation to collect and account for the assets; an action for an account could never be prescribed, except from the date that he repudiated the trust; this is no authority against the position that judgments against the city, like judgments against any other person, are subject to the law of prescription.

The Succession of Farmer, 32 Louisiana Annual, 1037, and McKnight vs. Calhoun, 30 Louisiana Annual, 408, are cited by the court to show that the city cannot claim a release from its indebtedness to the drainage fund by pleading its own neglect to revive the judgments in proceedings to that end, when necessary; we have demonstrated, as we believe, the utter impossibility of the city bringing a suit against herself for the revival; on the other hand, the plain, positive, textual provisions of the Code gave the warrant-holders the right to bring such suits themselves; in view of which it is deemed not disrespectful to say that the court has fallen into the error of charging the city with neglect on account of her failure to do what she could not do, and have given no effect whatever to the fact that the power to keep the judgment alive was at all times in the hands of the warrant-holders.

The Farmer and McKnight cases simply hold that the prescrip-

tion of a debt is suspended so long as there exists between the creditor and debtor such relation as will prevent any suit for the debt; there was nothing here to prevent the drainage warrant-holders from having their judgment against the city executed, or to have saved them from prescription by bringing suits to revive; the dissimilarity between the cases cited and the cause here is conspicuous.

As to these judgments the city is not a trustee; the Pike case and those of like character have no reference to the prescription of debts or judgments dischargeable in money, but even if they did, and the city be considered to any extent in the fiduciary relation as regards the judgments, this would not deprive the city of the benefit of prescription, not only under the articles of the Code themselves, but their construction by the Supreme Court of Louisiana; it has been held by the Supreme Court of the United States that "no laws of the several States have been more steadfastly or more often recognized by this court from the beginning as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court;" Bauserman vs. Blount, 147 U. S. 647, 652, citing numerous authorities; also Beal vs. Odeu, 163 U. S. 73.

In concluding its remarks upon the subject of this plea, the court says that it is doubtful whether statutory assessments of the character in question are subject to any prescription at all, and cites Reed vs. His Creditors, 39 Louisiana Annual, 115, which, in turn, cites State vs. Jackson, 34 Louisiana Annual, 176, and Davidson vs. Lindop, 36 Louisiana Annual, 707, to the effect that prescription established by the Civil Code does not apply to taxes; this part of the opinion again recalls the lamentable failure of the defendant to make its case clear.

The answer is barren of any plea of prescription leveled against the assessments themselves. The prescriptions pleaded are, first, that applying to the warrants sued upon, which is an "effect transferable by endorsement or delivery," any action upon which is barred by the prescription of five years; second, that of ten years, which bars any and all personal actions of any character whatsoever, established by article 3544, of the Revised Civil Code.

These two prescriptions, it will be observed, apply to the actions, and not to the grounds of liability, which it is brought to enforce; they do not concern themselves with the strength or weakness of the title; the action, however otherwise well founded, cannot be brought after the lapse of time stated in each case; the inquiry does not extend to the merits of the action in any respect; these articles bluntly declare that after the lapse of five years in one case, and of ten years in another, the action cannot be brought.

It is unnecessary to say more to point out to the court that these

two prescriptions are too widely different from to be confounded with any plea of prescription against the assessments which this suit is brought to enforce.

The other prescription—the one immediately under discussion, that of ten years—applying to judgments, concern the latter alone, and not the assessments which the complainant insists have been merged and lost in the judgments themselves.

A slight examination of Reed against His Creditors, State vs. Jackson, and Davidson vs. Lindop, will inform the court that two things cannot be more widely apart than the principles upon which the cases were decided, and that which they are cited by the court to uphold.

Whether or not the assessments in question are subject to prescription at all, which the court says is not certain, but only doubtful, the decisions of the Supreme Court of Louisiana cited to show that they are not, it is respectfully suggested do not at all sustain the proposition; they were interpretations of special statutes, altogether different in character from the assessments here, they concerned general taxes and not local assessments; the case of Reed vs. His Creditors, held that city taxes levied under section 20 of the charter of 1870, were by its express terms imprescriptible; that state taxes, levied under the provisions of act 37, of 1871, and act 36, of 1869, found by the court to contain language of similar import to that contained in the city charter, were not subject to the laws of prescription; in both cases the taxes were held imprescriptible because the statutes under which they were levied said so; far from sustaining the position that the drainage taxes were originally imprescriptible, they would rather tend to the contrary, because the law of 1858 contains no express exclusion of the law of prescription, while the statutes under consideration in the Reed case were held to save the taxes from prescription, because it was so said in terms.

Davidson vs. Lindop, 36th Louisiana Annual, 765, is also an interpretation of section 20 of the city charter of 1870, containing a clause which made the taxes imprescriptible; the Jackson case, 34th Louisiana Annual, 178, was likewise a construction of special statutes, under which general taxes were levied, presenting no point of resemblance to the assessment acts under consideration here; we have argued in our original brief to the Court of Appeals, page 39, that under article 3547 of the Revised Civil Code, in ascertaining whether or not the prescription which operates as a release from debt should be applied, the law regards simply the lapse of the requisite time; that in such a prescription, unlike that by which property is acquired, neither good faith nor a just title is necessary; this would not, as seems to be supposed, involve the monstrosity of freeing an agent or trustee, to whom property has been confided for another, from the obligation

of accounting for the same, after the lapse of a certain period from the inception of the agency or trusteeship; in such case the obligation of the trustee would not be to pay money, but to account for a trust. Prescription, it is true, as to the accounting, would not begin to run until the trustee had placed himself in antagonism to his trust, by setting up a title inconsistent with it or repudiating the same; but here we have no such question to deal with; the city pleads that she has been released from any debt founded on the drainage judgments against her by the lapse of ten years from their rendition; we are told that the city herself should have revived these judgments; but, as has been shown hereinbefore, ~~and the two briefs~~ that this it was impossible for the city to do, had she so desired, for she could not sue herself and occupy the position of both plaintiff and defendant in the same suit, while on the other hand, the warrant-holders were at full liberty, under the articles of the Code, to have brought their own suits for revival.

It should be borne in mind, however, that, as the contest and all the transactions relied upon by complainant began and ended in the State of Louisiana, they are governed first by the laws of that State; under ~~its~~ laws, good faith is not required to enable a party to invoke the prescription which operate as a release from debt, articles 3528, 3530, 3550 of the Revised Civil Code; under the law of that state, the fact that a party is a trustee does not deprive him of prescription *liberandi causa;* in a case like the present, we have already shown that the cases of Insurance Company vs. Peake, Succession of Farmer, McKnight vs. Calhoun, are so different from the present case both in point of fact and the law to be applied, that they are no authority in this controversy.

On the other hand, it is established by decisions of the Supreme Court of Louisiana that a party occupying the supposed position of trustee, which the city is driven into by the opinion of the Court of Appeals, may plead prescription against liability resulting therefrom, under conditions similar to those found here.

That the city was the trustee of the drainage judgments, charged with the duty of collecting them, and consequently cannot be heard in any respect to impeach their validity, and hence is estopped to set up that the judgments against it are prescribed, finds no application here; the law of prescription is found in the Civil Code, which is a statute of the State of Louisiana, as to the construction of which the decisions of the Supreme Court of Louisiana control; in the case ~~cited~~, of Brown vs. Insurance Company, 3d Louisiana Annual, 177, the facts were identical with the present case; certain parties were directors of a corporation, among the uncollected assets ~~of which~~ were certain stock subscriptions due by the directors themselves; these were never paid, nor were any steps for their collection taken

by the directors; in this condition ten years elapsed from the time the subscriptions became due, at which period a judgment creditor of the corporation, which latter had become insolvent and passed into the hands of liquidators, garnisheed one of the stock subscribers, who was also a director; he set up that the obligation was prescribed; the court said that the directors had neglected to act in the matter, notwithstanding which, the creditors of the company were not without remedy; that they might have caused the company to be administered, and the necessary calls to pay the subscriptions made and enforced; that the prescription which operates as a release from debt does not require the debtor to produce any title, or that he should be in good faith (Revised Civil Code, article 3530); the neglect of the creditor alone operates the prescription; when he is present, and his silence has continued for ten years, the law presumes payment; that good faith being not required for that class of prescription, the relation which existed between the garnishee and the defendants could be no obstacle to it; the court said it must hold, therefore, that the relations of the party under the contract or the charter did not affect the general law on the subject.

In Wagoner vs. Philips. 22d Louisiana Annual, 152, it was held that article 3476 (now article 3510), to the effect that those who possess for others, and not in their own names, cannot prescribe whatever may be the time of their possession, which, in substance, is the principle contended for by complainant here, namely, that the city as trustee cannot plead prescription of the judgments against herself, of which she was the custodian, did not apply to the prescription which operates as a release from debt; that the presumption of payment resulted from the lapse of the necessary time, *juris et jure*.

It is contended, however, that there are decisions of the Supreme Court later in date which overrule, Brown vs. Union Insurance Co.; the decisions cited are the following, as to which it may be said that no one in the slightest degree impeaches the authority of the Brown case found in 3d Louisiana Annual; this is apparent from the slightest examination of the cases.

The first is that of the Succession of Farmer, 32d Louisiana Annual, 1037; this case holds that as an administratrix cannot sue the succession she represents, prescription will not run against her on her claims against the succession as long as she is administratrix, because, being legally incapacited from judicially enforcing her claim by the law, its prescription is suspended under the law of *contra non valentam prescriptio non currit;* see 32 Louisiana Annual, p. 1041; a dictum altogether foreign to any question involved here.

McKnight vs. Calhoun, 39th Louisiana Annual, 408, to the effect that where there is a debt due by an administrator individually to the the succession which he represented, prescription is suspended during

his administration; there is nothing in this case, however, which touches the rule invoked by defendant; here the assessments are in the form of judgments, and the question is whether those judgments were saved from prescription by the fact that they were against the city herself; in the McKnight case the only party having the right to sue for the debt was the administrator himself, and hence there would be a reason why prescription should be suspended; here, however, the case is widely different; the assessments being in the form of judgments against the city, an action to revive the latter could have been brought by any one interested in the judgments; this, according to the textual provisions of article 3547 of the Revised Civil Code; therefore, the reasoning of the McKnight case finds no application in the present case; in the former, the succession and its creditors were without remedy; here the remedy of the drainage warrant-holders was complete and perfect; they had the right to bring a suit to revive the judgments; they were not left entirely in the hands of the city, as would have been the fact as to the succession creditors in the McKnight case; the city could not *sue herself* for the revival of the judgments, but the drainage warrant-holders had their remedy in their own hands, while in the McKnight case the situation was different; the creditors were without remedy, except such as could be availed of by the administrator himself.

Parish Board of School Directors vs. The City of Shreveport, 470 Louisiana Annual, 1310, is equally wide of the mark; it holds that where the defendant had collected taxes for school purposes, carried as such on the annual budget of expenses, that they must be applied to the purposes specified by the budget, and that the city could not plead prescription of one year against the taxes thus collected; in the present case, the defendant has collected no taxes, and does not plead prescription against any demands for funds which are in her possession, received for purposes designated by law; such would have to be the facts for the 47th Louisiana Annual case to have any controlling influence; the position of the defendant is simply that the drainage warrant-holders have allowed judgments against her to prescribe, and it is no answer to say that she, as trustee, cannot plead prescription; she is not pleading her own laches or neglect, but that of the drainage warrant-holders themselves, who had the right, under article 3547 of the Civil Code, to revive the judgments against the city; having failed to do so, prescription has run, and the judgments are extinguished.

Nor is the case of complainant in any way strengthened by its claim that the drainage assessments are governed by the law of prescription as concerns taxes levied for purposes of general revenue; and this cannot be more clearly demonstrated than by a reading of the two cases cited in support of that proposition; that of Davidson vs. Liudop,

36th Louisiana Annual, 766, declares that the city taxes for the years 1871 to 1879 are imprescriptible, and cites section 20 of the city charter of 1870, misprinted 1879, not the effect that all taxes levied under that charter are declared a lien and privilege upon the property until they are fully paid; it is sufficient to say that the drainage assessments in question here were not levied under the city charter of 1870, and hence that Davidson vs. Lindop, refers to a subject entirely apart from any issue presented here; nor is Reed vs. His Creditors, 39th Louisiana Annual, 115, of any more pertinence; this case simply holds the laws of prescription are *stricti juris*, that at most they constitute a bar to the assertion of rights judicially; that they are neither self-acting nor self-enforcing; that prescription proceeds upon the theory that one in whose favor a right once existed has lost its judicial recourse for its enforcement by reason of his own neglect; that such an equity cannot arise in favor of the subject against the sovereign by reason of the failures of her officers to perform their duty; this case may, in brief, be considered as holding that the law of prescription in the Civil Code has no application to the State or city as a bar to the *collection* of taxes due to either; it requires nothing more than to say that no such question arises here; the drainage judgments are not in favor of the city or the state, but, on the contrary, *against* the former; they exist in favor of the holders of drainage warrants, private persons, and the question here is the reverse of that before the court in the Reed case; there it was whether prescription could be pleaded by a private person against the claims of the city or state for their taxes; the issue here is whether the city herself can set up the bar of prescription against judgments against herself for the benefit of private persons; it is manifest that the two cases touch each other in no single point, and present no single feature in common.

The rule which intended to save from prescription the legal right of parties against money which is to go into the public treasury, and constitute a part of the public fisc, can have no reference to a fund, which, when collected, is to go into the pockets of private persons.

There is a serious ground of complaint against the Court of Appeals in not disposing of the plea of *res adjudicata* made by the answer; this plea, if well founded, would have terminated the controversy, but defendant is left by the opinion in ignorance as to whether or not the consideration of this plea, formed any part of the court's deliberations; in the opinion, it is passed by in silent contempt, but it is respectfully submitted that an examination of the facts upon which it is based, will show conclusively that it should have been maintained.

The plea of *res adjudicata* is based upon the fact that in the case of Peake vs. New Orleans, James Jackson, by intervention, joined with the complainant Peake in the relief which he sought; Jackson sued

upon a judgment at law obtained in the Circuit Court; reference to the petition in that case shows that the warrants of Jackson were not "work warrants" or "construction warrants" as were those sued upon by Peake, but "purchase warrants," issued under the act of the city's purchase made in 1876, under the legislative act of that year, and identical in all respects with those sued upon here by Warner, the complainant; the decree in the Peake case was against complainant, as well as against all those who joined him by intervention, and hence the present suit of Warner is based upon the same cause of action as that set out by Jackson's intervening bill in the Peake case, which, along with the original bill, was dismissed by the Circuit Court.

The presence of the purchase warrants as an issue in the Peake case appears in bold relief in the United States Circuit Court in that case found in 38 Federal Reporter, 782; the point was there made by complainant that a part of the warrants there involved were purchase warrants, and for that reason stood upon a higher footing than the work warrants sued on by Peake, complainant; but the Circuit Court, through Judges Pardee and Billings, held that both classes of warrants were alike, and the city's liability on the purchase warrants was rejected along with that on the work warrants.

The purchase warrants being all alike, that is to say, all issued for the price of the city's purchase—all parts of the same transaction—the status of one is the status of all; and the judgment adverse to Jackson, as regards his warrants, fixed the status of the entire series, including those sued on by complainant, as regards their being the source of any liability of the city; it would be a remarkable result that if Jackson, by reason of his having made an appearance in the Peake case, should have no right to the payment of his warrants, while complainant, standing aloof, should obtain here a decree entitling him to payment for the same kind of warrants, which Jackson failed upon in the Peake case; whatever is true of the purchase warrants sued on in the Peake case, is likewise true of those sued on in the present case; that the difference set up between the two classes of warrants was an issue in the case is shown by the citation thereof from 38 Federal Reporter; but it is sufficient to say that a claim against a city, founded upon purchase warrants, having been rejected in the Peake case, the same claim, made here, should meet with a like fate.

The action of the court in decreeing that the city was the debtor of the drainage warrants sued upon, is without pleading of the complainant to sustain it; the bill proceeds upon the theory that the city has made herself responsible for the drainage taxes assessed against private property and is the primary debtor of those assessments against streets, public squares, etc.; it nowhere asks that the warrants themselves, independent of the taxes, be declared a liability of the

city; it simply asks that the warrants be paid out of the taxes for which the complainant seeks to make the city liable; the error of making an absolute decree against the city is only exceeded by the more objectionable part of the decree, which allows interest at eight per cent. per annum from July 7th, 1876.

Act No. 16, of 1876, provides for no interest on the warrants, neither does the act of sale and purchase, for which the warrants were given, as a price; it is true, that the act of 1871 declares that the purchase warrants shall be issued in the same form and manner as those theretofore issued to the transfer company, under act of 1871, for work done, but this, by no reasonable construction, could be held to include the allowance of interest; nor does the circumstance that the warrants themselves provide that they shall bear such interest after their presentation, non-payment, or their endorsement, showing these facts; the administrator of accounts or of finance, by signing the warrants, could thereby produce no effect not authorized by the statute of 1876, as all of their doings were obviously referable to the statute under which they were acting, beyond which they were wholly without power; the effect of this allowance of interest would be to more than double the amount of the warrants; this will not be countenanced unless within the clear intendment of the law, which, manifestly, does not go this far.

Respectfully submitted,

SAMUEL L. GILMORE,
City Attorney.

BRANCH K. MILLER,
Solicitors for Petitioner.

NOVEMBER, 1898.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

versus

JOHN G. WARNER, RESPONDENT.

Brief for Petitioner.

Impressed with the conviction, that if the hard and oppressive character of the contract upon which complainant bases his rights, is once perceived by your Honors, there will be no doubt as to your action, petitioner deems it not unfitting, at the outset, to ask the attention of the court to certain features of the present case, which potently appeal to the fair minded, and strikingly address themselves to the sense of right.

This suit is founded immediately, upon a contract by which, on June 7th, 1876, the Mexican Gulf Ship Canal Company, and W. Van Norden, transferee, conveyed to the City of New Orleans, certain dredgeboats, derricks, barges and other articles, tools and implements, constituting an outfit for drainage work; the price of this sale was three hundred thousand dollars, payable in drainage warrants (see record, page 97).

This same property had been bought by Van Norden from the Canal Company, on November 22d, 1872, for the sum of fifty thousand dollars, paid by a release to that extent, of an indebtedness in a much larger amount, owing by the company to Van Norden. (Record, page 107).

To the ordinary mind, the conspicuous feature of a comparison of these two transactions, is the vast and gross disproportion, between the price for which Van Norden acquired the property, and that for which he sold it to the city; the latter being six times the former.

When there is further considered, the spirited description of the work of canal and levee building done with these very boats and other paraphernalia, from 1871, first, by the company, and then by Van Norden, until they were sold to the city in 1876, one is the more perplexed to understand this marvelous increase in value; unless every-day experience is disregarded and the promptings of common sense rejected, the mind is stunned with the monstrosity of the bargain; surely a court of justice cannot rise to a higher discharge of duty, than the subjection of such a contract, to an ordeal of the closest scrutiny.

It may be replied that by the city's act of purchase, she acquired not only the dredgeboats and like property, but also the rights, privileges, and franchises of the canal company, conferred by Act No. 30 of 1871.

But a reference to the statute will show, that the franchises and privileges of the canal company were to dig canals and build levees, for the prices allowed in the act; the purchase of these franchises by the city, was less an acquisition, than it was the assumption of an obligation to do the drainage work, and collect the cost thereof from the property liable to assessment under the statute; all this for the benefit of Van Norden. It appears by the appraisement, (record, page 95), that the value of the dredgeboats and other tangible property was fixed by the city's appraiser, at one hundred and fifty-three thousand seven hundred and fifty dollars ($153,750); the appraisement contained a reference to the damages claimed by the canal company for delays, upon which, however, no value was placed. It would be interesting to know the basis of the difference between $153,750, the value of the dredgeboats and other property, and the $300,000, which was eventually paid by the city as the price. The claim for damages in no respect entered into this sum, as it is not mentioned at all in the act of sale, which is a conveyance only, of the franchises of the company and of the tangible property mentioned. The first section of the act of 1876, authorized the city to make the purchase and settlement of the canal company of any and all rights, franchises or privileges, arising out of the act of 1871; also, the purchase of all tools, implements, machines, boats and apparatus, belonging to the company or its transferee, used for work authorized by the act of 1871; the second section of the act directs an appraisement to be made of the rights and things to be purchased and settled, if the council should deem it advisable to make the purchase. It is seen that the appraisement of the property reached an infinitesimal amount in excess of about one-half of the amount paid, and that the franchises of the company, which, it may be here remarked, had already been sold by the company to Van Norden on November 22, 1872, were not appraised at all.

A possible explanation of this, may be found in the assumption, that they were considered of no value, or not susceptible of appraisement at all; the mention in the act of purchase, of the payment of twenty thousand dollars ($20,000), in settlement of an amount claimed to have been diverted by the city, furnishes no aid to complainant in this view of his contract, as this was in addition to the $300,000 paid for the property and franchises.

The significance of the facts here adverted to is, that the superiority which your Honors have held to be enjoyed by the purchase warrants, over those issued for work, is founded on the fact, that the former were issued as the price of the sale of property, while the latter were given by a compulsory trustee in payment for drainage work, undertaken by it, in obedience to a direction of the legislature; the fact here shown by the record is, that only a small amount over one-half of the warrants were issued for such price, or at most for the kind of price that was meant by the court, when it made the distinction between the two classes of warrants; and whether or not complainant's warrants are referable to the number which were given for the price of the boats, or to the residue of the total price, is a question at any time difficult, but in the present state of the record, impossible of solution.

The decree in this case, has gone further than the relief prayed for by the complainant; it has condemned the city as the absolute debtor of the warrants sued upon, amounting to six thousand dollars, with eight per cent. per annum interest from June 6th, 1876, more than twenty-two years, which would make in all 176 per cent., this finding if applied to the whole three hundred thousand dollars of warrants, would involve a liability of huge proportions; the complainant nowhere asks that the city be decreed the absolute debtor of the warrants at all, but only that it might be made to account for such taxes as it should account for, and the sum thereof, when ascertained, applied to the payment of the warrants; it will be noted that the statute of 1876, under which the contract was made and the warrants issued, provided nothing as to the payment of interest, nor did the act of sale, passed in pursuance thereof; it is true that the former provided that the warrants "shall be issued in the same form and manner as those heretofore issued to the transferee of said company under Act No. 30, of the acts of 1871, for work done;" and that the latter act provides, that the warrants, after being issued, if not paid when presented, shall bear interest at eight per cent. per annum until paid; but this clause of the act of 1871, in no way concerns the "form and manner," of the issue of the warrants, which was all that was intended in common between the warrants issued for work done, and those for the price of the sale; under the act of 1871, the warrants bore no interest until they were presented for payment; in default of the latter, they were then to bear interest from the date of their presentment, to be

endorsed on the warrants themselves, by the the Auditor of Public Accounts; it is clear that interest on the warrants was a consequence of their non-payment, and the clause allowing it, was no part of the form of the warrant, or of the manner in which it was drawn; the warrant was necessarily a complete instrument, and everything pertaing to the manner and form of its issuance, must have been supplied, before it could be presented for payment; "the manner and form" of the warrants, as conptemplated by the act of 1871, could be in exact accordance with that statute, and yet no interest would ever become due, unless and until it had been presented for payment, its non-payment, and the endorsement thereon by the Auditor of Public Accounts of the city, the date of such presentment.

In a cause depending upon complicated issues of law and fact, and fraught with consequences so grave, as the instant case, every matter of defense should be examined and weighed with the greatest care; it will be found, however, that the opinion of the Court of Appeals contains no syllable of reference to a certain plea of defendant, which, if well made, would save it from all liability; this plea is that of *res adjudicata*, extending to every form of relief sought by the bill; it is based upon the finding of this Honorable Court in Peake vs. New Orleans, No. 852 of the October term of 1890, and reported in the 139th United States, page 342, and is one phase of the present application which, it is deemed, specially addresses itself to the favorable consideration of the court, interested as it is in the correct construction and proper application of its opinions, and in that uniformity which is a paramount necessity in jurisprudence.

The opinion of the court *a qua*, as is endeavored to be shown further along, has, as its fundamental thought, certain principles which this court is supposed to have announced in Warner vs. New Orleans, 167 U. S. 467; it is respectfully urged that a comparison of the opinion in that case, with that of the Court of Appeals in the present case, will reveal that the former has been wholly misconstrued and misapplied.

Addressing itself to the highest source of relief, and basing its prayer upon such considerations as, it is hoped, may control your Honors' judgment, petitioner, whose case has never been before this tribunal in such form, that the strength of its position could be adequately perceived, craves attention to its complaint, against what is believed to be an unjust judgment of the Court of Appeals.

The principal grounds upon which this application is based are that the Court of Appeals has misconstrued and misapplied a decision of this court, Warner vs. New Orleans, 167 U. S. 347; that it has failed to give, not only the proper, but *any* construction and effect at all, to the opinion of your Honors in Peake vs. New Orleans, 139 U. S. 342, in its failure to sustain, or even mention in its opinion, the plea of *res*

adjudicata, based upon the decree in that case; subordinate to these considerations there are others, some springing therefrom, and others independent and substantive grounds of relief.

The grounds upon which the petitioner has main reliance are, that the decision of this court in 167 U. S., has been erroneously construed by the Court of Appeals, as decisive of many important issues in the present case; that the defense of *res adjudicata* pleaded by defendant, is not mentioned in the opinion of the court, and that the city should not be cast until all its defenses have been considered and overruled; subordinately, that the conclusions of the Court of Appeals, as to the liability of defendant, are totally unfounded; for instance, no effect whatever has been given to the constitutional amendment of 1874, or, to be more accurate, it has been given an effect, the reverse of what it was designed to have, and in violation of its very terms; that the four pleas of prescription, each applying to a different phase of the controversy and governed by considerations widely different, have been disposed of by the lower court in bulk, by the single finding that the city, as a trustee, is incompetent to raise them.

The slightest examination of the finding of this court in Warner vs. New Orleans, 167 U. S. 467, discloses what is as plain as anything can be made to appear, namely, that the court had before it two questions, and no others; namely: Was the city estopped to plead its bond issue in discharge of its asserted liability herein, and second: Whether or not the present case was covered by that of Peake in 139 U. S.?

It is evident from a glance at the opinion of the Court of Appeals, though not expressly so declared, that the court conceived itself bound against defendant on the whole case, by what was said when it was before this court on the certified questions; the opening sentence of the opinion is, that "As to nearly all of these defenses, we might well rest our decision in this case on the opinion of the Supreme Court, expressed in its answer to the certified questions;" as a matter of fact, no single defense of those spoken of, save that based upon the bond issue, had made its appearance in the case, as a matter for consideration, until set up in the answer; it is true that in the demurrer of defendant, the case of Peake was pleaded as *res adjudicata;* but considering that this defense was not properly set up in the demurrer, for the reason that it required evidence to support it, it is seen at once that any claim that it was ever considered at all, is gratuitous; it is, therefore, perfectly correct to say that instead of the court being able, if it saw fit, to dispose of all of the defense which appear in the answer, by resting its opinion upon what was said by this court in answer to the certified questions, the fact is, that the defense based upon the bond issue was the only one which had ever been submitted to, and received consideration.

It may be inquired, to what purpose the bond issue is set up in the answer as a discharge from liability, after it having been held by your Honors that it could not be considered as a defense; but this is readily explained; the question submitted on this branch of the case was, whether *under the case stated by the bill*, the city was estopped, to set up the issue of its bonds as a discharge of liability; and, in deciding this question, your Honors said (167 U. S. 475), that, in order to a full understanding of the question to be answered, a review of the facts was essential; and that, for the facts, you would look simply to the statement prepared by the Court of Appeals, and not to the bill and exhibits, copies of which were ordered by the Court of Appeals to be sent you; it will be noted that the conditions upon which the question was to be decided, were specified by the latter, as the facts stated in the bill, while this court declined to examine the bill for this purpose, but confined itself to the statement of the Court of Appeals; neither by the bill, nor by the statement, did it appear that Van Norden himself, or parties to whom he had transferred drainage warrants, or his employees, received the whole of the bond issue in payment of drainage warrants; and that, hence, he was the recipient of all the benefits thereunder; it appeared from the bill that, at the time the bonds were exchanged for warrants, the entire drainage fund outstanding and uncollected was, in round numbers, $1,400,000, and that, by issuing these bonds for an amount in excess of $1,600,000, which were received by the warrant holders at 90 cents on the dollar, that the city had at least put into the fund the whole of it that could have been realized, if every dollar had been collected and paid over to Van Norden; your Honors have said in the Peake case, 139 United States, page 359, that, when the city thus paid this amount into the drainage fund, that as she had no power to make donations, the payment must, in equity, be treated as a discharge of obligations, if there were any; in answer to the certified questions submitted to this Court, it found a difference between the work or construction warrants involved in the Peake case, and the purchase warrants involved in the present case, and held that the city could not be permitted to destroy a fund, against which she had drawn her warrants, in payment of the purchase price of property; that this would result from her pleading, that she was no longer indebted to the fund by reason of the payment, made before the purchase warrants were issued; had the bonds been received by others than Van Norden, or those holding under him, the case would be quite different from what it is in fact, namely: that Van Norden himself, and other holders of warrants received from him, were the beneficiaries of the city's payment; it is clear that if the city be not allowed credit for the drainage warrants that were retired by her bonds, and at the same time be made responsible for the entire fund, as claimed by the bill, that the taxes have been increased by $1,600.00

over what they were ever contemplated to be, by the laws under which they were levied; if Van Norden, or, what is the same thing, persons who had acquired warrants from him, be permitted to receive the fruits of the city's bond issue, and at the same time hold the latter responsible for the balance of the original fund unpaid and uncollected; he would be left in the attitude of receiving, the bonds as a mere gratuity, and at the same time exacting from the city its full measure of asserted responsibility; if it be said that the city by drawing its purchase warrants against the fund, must be considered as affirming the existence of that fund, the answer is, that Van Norden knew precisely what the fund was; and if the city's asserted liability for assessments on streets, public squares, and property of a like character were thus paid and discharged, and he was left with the assessment against private property alone to pay his warrants, it would be only a repayment to the city, of less than one-half the amount of the bonds upon which it was liable and paid, and the proceeds of which went into the pockets of Van Norden himself.

Proceeding, however, the opinion which is marked by a frequent reliance on estoppels, goes on to say that the city's claim that she is not bound by the assessments and judgments against herself, as *quasi* owner of streets and other public places, on the ground that such assessments and judgments should be considered void *ab initio*, for the reason that public property is exempt from taxation, finds that the city, under the principles laid down by your Honors in answer to the certified questions, is estopped to deny their existence and validity, to the same extent that it is estopped to set up its bond issue, as a discharge of its general liability as trustee, with reference to the fund; the court, however, adds, that independent of estoppel, the authorities *seem* to affirm a liability under conditions surrounding the city in the present case; with regard to the estoppel, your Honors have said nothing as to how far the city was bound as to the particular assessments composing the fund; all that you have said is, that she could not impair that fund, whatever it might be, by an allowance of the bond issue, as a credit against it; nothing can be found in your opinion which declares that the assessments on streets and public squares are valid; it is difficult to understand the application in this regard, of the court's answer to the certified questions; the *seeming* affirmation of the city's liability given by the authorities, brought in to support the theory of estoppel, to invite confidence, should be supported, at least, by similarity between the statutes under consideration in the cases relied on, and those involved here; the acts of 1858, 1859 and 1861, bear intrinsic and conclusive evidence, that private property alone was intended to be assessed.

For instance, by section 7 of the act of 1858, directing how the boards shall proceed, it is directed to make a plan designating the

limits of the section to be drained; the subdivisions of the property therein contained, and the names of the proprietors; after depositing this plan in the mortgage office, and advertising such fact, the commissioners are directed to apply by petition to one of the district courts of New Orleans, for that part of the district lying within that parish, and after the observance of certain forms and delays, the court is to decree, that each portion of property situated within the limits, should be subject to a first mortgage, lien and privilege; this clearly contemplates only such property as may be susceptible of mortgage or privilege, which would not include public property; should there be any doubt of this, it is cleared by the further provision of the section, that the drainage mortgage should take precedence over all other mortgages, liens, and privileges whatsoever, whether tacit, conventional, legal, or judicial; in what sense could these mortgages be understood, as applied to public property? That private property alone was intended to be assessed, is declared by the precedence which is given to the drainage mortgage over the other kinds of mortgage named, which could only be applied to private property; for instance, a tacit mortgage is that which a wife enjoyed on the property of her husband, prior to the adoption of the constitution of 1868; a conventional mortgage is one created by contract between one person and another; a legal mortgage is one which results from the registry of a judgment in favor of one person against another; public property is not susceptible of being affected by any of the mortgages named, and the kind of property to be burdened by the drainage judgments is the same kind, and no other, than that which the several species of mortgage named could encumber, that is, property the title to which is vested in private persons.

By section 9, on non-payment of the assessment, judgment could be recovered for the same, and the land assessed be sold; and the board was authorized to purchase, hold and dispose of the same for the benefit of the district; this clearly shows that the kind of property out of which the taxes was to be collected was one which could be acquired by a private person, or by the board itself, or, in other words, property which could be bought and sold by the owner; a seizure and sale of property by judicial process, is only exercising *sub modo*, the right that the debtor himself, would have to sell it; in the absence of an owner with power to dispose of the property, as where the title is in the public or all the people, there can be no seizure and sale for the collection of the tax; property out of commerce, not susceptible of alienation, was not in view by the framers of the act.

The only reference to streets, etc., in connection with the drainage scheme is found in section 8 of act 191 of 1859, which provides that the board shall have access to, and the right of copying, any plan or parts of plans of the city, in the possession of the council,

or any officer thereof, which is to be certified by such custodian to be a correct copy, the same to include streets, etc., or any portion or section thereof to be drained, according to the provisions of that act, or the act of 1858; this section purports to do nothing more, than to secure to the board copies of any city plans that might be needed in the discharge of their duties; the direction is, that the plan shall include the streets of any portion or section which is to be drained; the direction that the copy shall include the streets or any part of the city to be drained, is not a declaration that the streets are to be assessed for drainage; it was merely to make sure, that the board would obtain complete and intelligible plans of any part of the city it might wish, and that the streets were to be delineated thereon, in order to the better understanding of the plan; it would be strange that, after the voluminous provision of the act of 1858, which contains thirteen sections, covering something more than five pages, it should have thus far remained silent, as to the liability of the streets for assessments, and that such liability should be fixed in three lines of the concluding section of the act of 1859; and then only by an inference which narrowly escapes being conjectural; it is incredible that so large an item of revenue should be left to depend upon so frail a title; all presumptions would be against the purpose of making such property liable to assessment, to remove which would require language of unmistakable meaning; as plain as any fact can be made to appear, the section intended nothing more than to secure to the board the right to have copies of the plans so made, that the streets would appear thereon; there is no room for supposing that the copies of the plans so furnished were to be the basis of the assessment; they were only for the use of the board for any purpose which they might serve, as, for instance, to show the boundaries by streets of the private property to be assessed.

Act 57, of 1861, however, removes all doubt as to the non-liability of streets, etc., to assessments; it declares that the amount of the assessment, fixed by the board to be paid yearly by the owner or owners of the lands within the district, for the purpose of the act, shall be exhibited upon a tableau, upon which the property assessed shall be set forth, with the names of the owners, and, as if to emphasize the intention that only such property as was susceptible of ownership by a definite person was contemplated, it is further provided, that if the owners were unknown, the assessment rolls should state that they are unknown; a petition should be filed praying for an order that all persons whom it may concern show cause, in thirty days, why the roll should not be homologated, and that after the publication of said notice, on motion of counsel for the board, the court should homologate the rolls, which should be a judgment against the property assessed, and *the owners thereof*, on which *execution might*

issue, as on judgments rendered *in the ordinary mode of the proceeding;* this again emphasizes the fact that the only property entitled to be reached by the assessment, was property *susceptible of alienation*, and which was *liable to seizure by the sheriff*, processes altogether unknown and impossible, as regards streets, squares, etc.

The act of 1858, in all of its recitals, negatives the idea that public property was in contemplation; it directs that all the subdivisions of property, with the name of the owners, shall appear by the plan; a street has no subdivisions, and the city is not its owner, but is only an administrator of public property for the benefit of the people; significance is given to the fact, that private property alone was intended to be assessed, by the requirement, that where the owner is unknown, that fact should be so stated; private ownership is always found in association with the property intended to be charged; the further provision that the recorder of mortgages should report the drainage lien, privilege, and mortgage, as taking precedence over all other mortgages, legal, conventional and judicial, affirms that the drainage encumbrance should extend only to such property as is susceptible of the mortgages described; and public property is not within this category; the act of 1861, providing that the drainage tax should be collected on execution as in ordinary cases, would necessarily limit the enforcement of the tax, to such property as was liable to seizure and sale by the sheriff; which, of course, would not comprehend the streets, squares and property of a like character.

Streets and public squares are "public things," and are for the common use of the city. Revised Civil Code, article 454.

The drainage taxes are local assessments, which are a peculiar species of taxation; they differ from general taxes in the respect that the latter are levied without any assurance that the taxpayer will be benefited, while the former are made upon the assumption that a portion of the community is to be peculiarly benefited, in the enhancement of the value of property, specially situated as regards the contemplated improvement.

Cooley on Taxation, p. 606, et seq.
Desty on Taxation, Sec. 59, pp. 281-285.

Where there is no peculiar benefit there is no liability for the tax.

Desty on Taxation, p. 285.
State vs. Clinton, 26th An., p. 561.

That the statutes of 1858, 1859 and 1861 did not have in contemplation public property, such as streets, squares, etc., as subjects of assessments, is manifest from the terms of the acts themselves; the assessments were to be made against the property and the owners thereof; the city is not the owner of the streets and squares; they belong in

common to all the inhabitants of the municipality. Revised Civil Code, article 458; the city has no relation to them except an an administrator, with the right to regulate their use.

14th La. An. 842, 82;
12th La. An. 747;
32d La. An. 915;
37th La. An. 67.

The city not being the owner of the property in question, in no event could be held liable for the tax; the statutes did not intend that any assessment should be made against streets or public squares, and the commissioners in so doing were in excess of their authority, as the tax was to be levied against property and its owners; the title of ownership was necessary in order to make any person liable to the charge; property, the fee of which was not in any person, natural or artificial, known or unknown, in which category streets and public squares would be included, was evidently not in contemplation as subject to assessment, for the terms of the statute, fixing the liability upon the *property and the owner*, in the order named, may reasonably be deemed to have intended, that for the collection of the tax recourse should be restricted first to the property, and afterwards to the owner, in the event that the assessment was not collected in full out of the former; the justification of the tax, being the supposed benefit conferred upon the property by the increase of its value, the suggestion naturally arises, that the collection of the tax is primarily confined to the property which is intended to be improved; it *could* be, for such cases are disclosed here by the evidence, that the entire property might be taken for the tax, and leave a balance unpaid, that is to say, the owner would have lost his property altogether, and still be in debt; on the other hand, the sale of the property, and such cases are also disclosed by the record, might pay the tax many times over, in which event there would be no necessity of recourse against the owner; a local assessment being in its essence a tax on land, and not against persons, is naturally payable first from the property itself, and the personal liability, if there be any, should be asserted only for any balance remaining unpaid, after the property has been exhausted; these considerations tend conclusively to the result that there is no personal liability, or any right to take execution against the owner, until the property is first exhausted, and then only for unpaid balance.

Applying this to the asserted liability of the city, as a debtor for the taxes on streets and public squares, how would the city stand in the issuance of an execution, for the sale of its streets? What would be the effect of a suit for a mandamus to compel the city to pursue such a course? How would result, the efforts of the warrant holders themselves, if they were in a position so to do, to sell the streets and pub-

lic squares for the payment of the taxes? Going further, imagine a number of drainage tax judgments, and every street in the city named upon the assessment rolls put under seizure by the sheriff, and the farce of its advertisement and adjudication to a purchaser persisted in, what kind of a title would such purchaser receive, and what manner of possession would the sheriff give under his adjudication?

Referring, again, to the rule that local assessments are upheld on the ground that they confer a peculiar and special benefit upon certain property, in which other property does not participate as regards public streets and public squares, of which the entire people have the free use and enjoyment, what special benefit would they receive from the drainage, apart from other property?

They are not in commerce, and have no value which can be measured in money; they belong to no one person, not even to the city herself, but are the property of every inhabitant. See Neenan vs. Smith, 50th Mo. 525, 528.

Hartford vs. West Middle States, 45th Conn. 462.

The city in no event could be held as a trustee of the assessments and judgments against herself; as to these she was a debtor and not a trustee; besides which, it will be seen that the court has dealt with the city's defense as to these assessments, as though it was based simply upon the exemption from taxation of public property, in the general sense.

It may be premised, that the defense set up is not simply that the public property in question, is exempt from taxation, but also that it was not intended by the act of 1858, to be assessed for drainage taxes; your Honors will observe that this part of the city's defense, on this part of the case, is not noticed in the opinion.

The claim that the city is a trustee, is based upon the provisions of Act No. 30, of 1871, and more particularly upon those of section 9 of that act.

Defendant insists that by that statute, it is not made a trustee of the assessments against public property; that no such intention is expressed or implied by any language that it contains; on the contrary, from the circumstance that it is made a trustee as to assessments against private property, and no mention is made of those against public property, its trusteeship as to the latter is completely negatived; and, further, that the failure to mention assessments against streets, etc., either expressly or by inference, may be evidence that they were deemed invalid by the legislature; on the other hand, it is clear, that the only assessments turned over to the city, were those against private owners alone; this is shown by the duties imposed upon the city; the act says, section 9, page 78, that the Board of Administrators "be and are hereby authorized and directed to collect from the *holders of the property* within said districts, the balance due on the as-

sessments, as shown by the books of the first, second and third drainage districts, under the acts of March 15th, 1858, and March 17th, 1859, and the several acts supplementary and amendatory thereto, which said *assessments* are hereby confirmed and made exigible." Italics are ours.

The same section says (page 77), that the Board of Drainage Commissioners "shall transfer to the Board of Administrators of New Orleans, all moneys, assessments, and claims for drainage in their hands or under their control, * * * a true statement of the claims of said Drainage Commissioners against the city, to be adjudicated and settled out of any money *collected* by the city."

The claim that the assessments against the city, were included in the assessments placed under the control of the board, is seen to be entirely without force, when, reading further, it is ascertained, what the city was directed to do with these assessments, namely, to collect them from *holders of property* within the districts, language, which by no construction could mean anything else, than that the assessments so turned over, were those against the owners of private property, from whom the city was to make collections; the city surely was not to collect from herself as a holder of property; for a debtor to collect from himself what is due to his creditor, and pay it over to the latter, is an incongruity, the imagination is unable to picture; if this mode of thought were pursued with reference to the holders of private property, the act would have declared it their duty to collect from themselves and pay over to the city; nor is the "true statement of the claims of said Drainage Commissioners against the city, to be adjudicated and settled out of money collected by the city," a description, which would comprehend the assessments against the city, as included in what the board was to receive; the assessments, had prior to 1871, passed into the judgments so strongly relied upon by complainant, and hence, there was nothing to be adjudicated upon; and in any event, the assessment on streets was not to be paid out of money collected by the city from any one, but out of its own hands.

It is no answer to say that the transfer was for the purpose of collecting these amounts; this is limited to assessments against the holders of property, in which category the city could by no interpretation be included; nothing could be accomplished for the warrant holders, by making the city transferee of the judgments against herself; it was indicated in the clearest manner that the assessments against public property were not contemplated by the act of 1871; whether because they were regarded as invalid, or for any other reason, need not be determined; the exigencies of defendant's case are sufficiently met, in this regard, if the fact be, that the assessments against streets, squares and property of a like character, were not, as complainant insists, and the Court of Appeals declares, confirmed and made exigible by the act of 1871; the true construction of that statute, harmonizes with peti-

tioner's argument, that the act of 1858 did not intend that such property should be assessed; that the act of the commissioners in placing it upon the rolls was arbitrary and without legal effect, and that the judgments of homologation all on their face purporting to be rendered in accordance with the statutes authorizing the assessments, could have no greater effect than the statutes and assessments themselves; there would be as much authority for the commissioners, to have placed upon the rolls, property situated outside of the drainage districts, as there would be to place thereon, property within them, but not of the character which the statute intended to be assessed.

With regard to the declaration in the opinion, that the drawing of the warrants against the drainage fund, composed largely of these very assessments and judgments, operated as an estoppel to deny their legal existence, it is respectfully submitted, assumes against defendant the entire matter at issue; the warrants were drawn against the drainage taxes, and in no particular was it undertaken to define what they were, nor is there any fair implication as to what taxes composed the fund; to draw a warrant against drainage taxes, without specification as to the property which is assessed, and the persons who are involved therein, while it might assume the existence of a fund of some sort, leaves entirely at large, any question as to whether assessments against public property, formed any part thereof; the physical existence of certain rolls on which streets and like property, were assessed, does not, in the faintest degree, import anything as to their legal effect, or that they had any; during the many years from 1858 to 1871, the city had not paid one dollar of these so-called assessments, and during that period the municipality had enjoyed prosperous times; no warrant holder ever attempted to enforce against her, any right based upon the city, or the streets, being liable for drainage taxes; Van Norden himself, in 1872, instead of, by mandamus or other proceeding, attempting to realize from the city, the large sums now imagined to be due for assessments on public property, and thus realizing in cash to the extent thereof, contented himself with obtaining relief by the city's bonds, which, by the act under which they were issued, he was required to take at a discount; instead of these assessments being confirmed by the act of 1871, as far as any fact can be declared and acquiesced in by silence and inaction, the non-liability of the city was established, not only by its own conduct, but by that of every holder of drainage warrants; if, in 1876, as is declared in the bill, with reference to the failure of the city to prosecute the work of drainage, shown by the evidence of Brown to be due to the lack of means, it had an unlimited power of taxation, it is extraordinary that Van Norden, who at that time was a large holder, both of work and purchase warrants, abstained, for the purpose of compelling payment of the judgments against her, from any attempt to enforce the exercise of this power, by appropriate legal proceedings.

The assumption of the opinion, that the Supreme Court of Louisiana has held the city liable for assessments made on the area of streets, if scrutinized, is seen fo be altogether unfounded in fact, so far as any application to the present case is concerned.

As to the first case cited, that of the Draining Company, 11 An. 338, it may be premised by saying that the question of liability of streets, etc., to local assessment was not before the court, which, as to this question, decided nothing. But in order to be certain, it would be well to subject the opinion of the court in all its parts to the closest scrutiny.

The first point raised, was that the charter of the company was unconstitutional (see page 339), the claim of unconstitutionality being based upon several grounds set out in detail, the first of which, namely, that the charter imposed taxes upon a portion of the community only, for a work beneficial to the public at large, was sustained, and there the whole matter would have ended, had it not been that a rehearing was granted in the case.

On the rehearing the court held, first, that as the legislature had the power to drain the swamp in the rear of the city by its own agents, it had also the power to do it through the intervention of a company created for that purpose; second, that the charter of the company was not in violation of article 124 of the constitution of 1852, which provided that the citizens of New Orleans should have the right to appoint the several public officers necessary for the administration of the police of the city; third, that the mode of paying for the work done by the Draining Company, was not in violation of article 123 of the constitution of 1852, or of article 127 of the constitution of 1845, which provided that taxation should be equal and uniform throughout the state (see pages 372 and 373); fourth, that the charter of the company was not violative of article 105 of the constitution of 1852, so far as it provided, that vested rights should not be divested, unless for purposes of public utility, and for adequate compensation previously made; as to this point, however, the court took occasion to say (p. 373):

"We have not understood from counsel, that there are any cases in which the property has not been so far benefited by the work done, as to be increased in value more than the cost of the work assessed. Were this not the case, the property of each proprietor, to the extent of the difference between the increased value, and the cost of the work assessed to him, would be taken for a purpose of public utility without adequate compensation previously made, and consequently there would be a violation of the provisions of article 105 of the constitution."

It is proper here to observe that the principle thus announced by the court, is identical with that declared by act 67 of 1877 (see page

106), attacked by complainant as being an impairment of the obligation of his contract; the act of 1877 says that the true intent and meaning of all drainage laws of this state, where liens and privileges are recorded against the property requiring drainage, are, that under the same no assessments or judgments can be collected, until after there had been conferred upon the property such improvement as will effect drainage, equal in value to the assessment exacted from the property; in this view the act of 1877 would have introduced no new element or principle, by which complainant's rights were affected; the principle declared by the act of 1877, was announced by the Supreme Court in the Draining Company's case in 1856, two years before the adoption of the first statute under which complainant asserts his rights.

Proceeding, however, with our effort to show that in the case discussed, nothing was said as to the liability of streets and other public places for the drainage assessments, the decree in favor of the company was attacked (p. 375), because the citation was by publication, and did not amount to a notice; the court held that the legislature could determine in what manner parties could be brought into court, and that such a notice was valid.

It was next contended, that the estimate of the cost of the drainage was not in conformity with the charter, but this the court held was cured by the judgment, and had been acquiesced in by the parties, who had daily seen the work upon the land in progress, and had made no objection or remonstrance.

It was further contended that the company could not recover for any work done on section 2, after the first of January, 1849, the date when it should have been completed; this contention was rejected by the court, which affirmed the judgment of the district court denying the company compensation for work done after a subsequent date, that is, May 10th, 1849.

The next contention concerned the matter of the allowance of interest, as to which the judgment of the lower court was amended; the homologation of the tableau was opposed again (p. 376), on the ground that the amount should be reduced by reason of the delays of the company in prosecuting the work; this contention was rejected.

It was next contended unsuccessfully, that the work as regards section 2 of the drainage area, was not promptly done, in that said section, was not isolated from other part of the city.

Further grounds of opposition concerning the expenses of cutting the wood and timber, standing on section 2, the manner of the charging of interest, and the mode of assessment, were all disposed of by affirming the action of the district court.

We have been at pains to go through the whole of this decision, in order that the minor and incidental references to the matter of

streets, was dealt with by the court, after it had disposed of all the oppositions before it. It does not appear that the assessment against streets, was put at issue by the pleadings of any party before the court; certainly, the city was not there, as it is here, opposing the inclusion of the streets in the land to be assessed, and the only reference to the subject of streets, is found in the conclusion of the court's comment upon one of the effects of assessing lands, of no value, at the same rate as those of great value; one feature of such a method mentioned by the court in the concluding paragraph of its opinion, is the imposing upon the city, for the streets, a large portion of the expense; it is obvious that this random expression, by which it is intended only to describe the consequence, if a certain view were taken of the case, and appearing in a mere fragment of the opinion, not adjudicating upon the claims of any person before the court, in any event not upon the city herself, cannot be considered as an authority of even the slightest weight, in support of *the* proposition that the streets were liable to assessment. The subject is spoken of only as a consideration supporting on equitable grounds, the assessment in the same manner, namely, by the superficial foot, of all property, whatever might be the differences in value; it was put by the court only as an illustration to show the justice of such a mode of assessment, and obviously, its correctness was not questioned and decided, but, on the contrary, assumed.

Nor does the case of Marqueze vs. The City of New Orleans, 13th A. 319, contribute in the slightest degree, to the solution of the issue, whether or not the streets and public squares were liable to assessments under the drainage laws in question here; the liability of the city in that case did not depend upon the general liability of such property to assessment, but grew out of the express contract made by the city with Marqueze, to level, grade and shell Claiborne street, from St. Bernard avenue to Elysian Fields street, on one side of which was a middle or neutral ground, which did not belong to any of the front proprietors; in payment of the entire work, the city delivered to Marqueze, the contractor, bills against the property-owners on the side of Claiborne street opposite the neutral ground, which included the entire cost of the shelling; by section 119 of the city's charter, however, the owners of real estate could only be made to pay the cost of street paving when they owned the property fronting on both sides of the pavement; the effort of the city to throw the entire cost of the paving upon the front proprietors who owned the property only on one side of the street, was an attempt to force upon them the liability which the city charter said they should not bear; the city itself having made the contract with Marqueze, and in payment therefor having given him an order on the property-holders, which to the extent of one-half was not enforceable, it was required to make good the price,

which it had contracted Marqueze should receive for his work; the city could be held liable, irrespective of its alleged ownership of the neutral ground; the property-holder not being the owner of this portion, could not be called upon to pay as such owner; the Supreme Court must not be understood as declaring what is denied by the Civil Code, and by numerous decisions rendered prior to the Marqueze case, that the city is the owner of a public street or public square; on the contrary, this is expressly negatived by the language of the court, which is found on page 320, as follows:

"The city is obliged to make and pay for one-half of the paving in the case at bar, not only from the effect of section 19 of the city charter, but also because the middle ground on Claiborne street is the property of the city, and intended and dedicated as a public promenade, for the public use and enjoyment."

It is thus that the city's relation to the property is defined; if the property is dedicated to public use and enjoyment the city cannot, in the sense of the drainage acts of 1858 and 1859, be its owner, because over such she has no power of alienation, nor can she subject it to privilege or mortgage.

It must not be understood that the imposing upon the city, of the liability for the shelling in the Marqueze case means, that she must pay the assessments upon the streets in the present case; in the former case her relation to Marqueze was one growing out of a contract, while here there is no contract between herself and the Boards of Commissioners who levied the assessments upon the streets; under the statutes at issue here, there could be no assessment to affect any person, directly or remotely, except the owner of the property, and so far as this term is used in the opinion of the court in the Marqueze case, it is clearly not in the same sense in which it is found in the statutes of 1858, 1859 and 1861; the context of the Marqueze decision shows clearly the meaning of the city's ownership therein spoken of; it was an ownership of the property which was dedicated to the public use, which is the same kind of ownership described by the articles of the Code and the decisions, which class the city, not as owner, but simply as the administrator of such property.

It will be observed that of the five members of the court but three concurred in the opinion; Mr. Justice Buchanan, having an interest in the suit, took no part in the decision, while Mr. Justice Spofford dissented from that part of the opinion, which gave countenance to the claim that the city was the owner of the neutral ground, and which subjected the latter to any part of the cost of paving; Mr. Justice Spofford concurs in the decree on the ground that the city warranted the validity of the claims against private owners given to the contractor, and that the contractor having by judgment been defeated in the collection of his claims, the city was liable to him for the same.

The case of Correjolles vs. Succession of Foucher, 26th An. 362, so far as the facts are concerned, is similar to the Marqueze case, except that the defendant's attorney in that case, the Hon. Edward Bermudez, counsel for defendant, and late Chief Justice of the Supreme Court of the State of Louisiana, did not go the length of claiming that the title to the neutral ground on St. Charles street, was in the city, but contented himself with the claim that it was either in the Carrollton Railroad Company or *the public;* it will be noted in the 26th Annual case, while it is declared that the case is controlled by the Marqueze case, in construing the latter, the court says that it was there held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and the city was bound to bear one-half of the expense of constructing a road on the north side of Claiborne street; to say that the neutral ground belonged to the city as a *locus publicus* is to say that it did not belong to the city in ownership, of which a *locus publicus* is not susceptible; as to public places the city has simply a right of administration, the fee being in the people; we are, therefore, verified by the 26th Annual case in our construction of the Marqueze case to the effect that it was not intended by the latter to say that the neutral ground on Claiborne street was susceptible of ownership by the city; the determination of the Marqueze case being, that the ground belonged to the city and was dedicated to the public use and enjoyment, terms which when construed together mean nothing more than the definition of the city's possession of such property under the articles of the Code; the 26th Annual case brings out conspicuously this feature of the Marqueze case, where it declares that the middle ground of Claiborne street belonged to the city as a *locus publicus*, which means that the city was its owner in the narrow and restricted sense, of an administrator for the public good and use.

The constitutional amendment of 1874 (see acts 1894, page 56), prohibits the city from increasing its debt in any manner, or in any form, or under any pretext, after the first of January, 1875; it forbade the drawing of any warrant or other order for the payment of money, except against cash actually in the treasury; it contained a proviso that the amendment should not be so construed as to prevent the drawing of drainage warrants in favor of the canal company or its transferee for work done under Act No. 30, of 1871, *payable exclusively* out of drainage taxes; it is difficult to conceive by what exercise of ingenuity, the scope and effect of the amendment could be misinterpreted; its evident purpose was to prevent the city from creating any debt, bonded or floating, in addition to that already existing on the 1st of January, 1875; it absolutely forbade the drawing of any warrant, except such as could be immediately paid with cash on hand for that purpose; and the permission to draw warrants payable out of the drainage tax alone, only brings in bolder relief, the inhibition against

the drawing of any warrant, or order for the payment of money, which, in form and effect, was payable otherwise than out of the cash on hand, or out of the drainage taxes.

The amendment, as interpreted by the Court of Appeals, has furnished an authority, instead of announcing a prohibition, against, the city incurring additional debt; it may be added, in passing, that the claim that defendant's case has not been fully understood by the Court of Appeals is completely vindicated by its remarks in reference to this part of it; it is said: "It would seem that the authority to issue warrants against the drainage fund, after that date, necessarily implied an affirmation of the right of the city, to the completion of the drainage work then in progress, and imposed a corresponding duty on the city, to collect and apply the drainage assessments to the payment of the warrants;" when it is considered that the "work then in progress" was being conducted, not by the city, but by Van Norden, as transferee of the company, and the city was under no duty,—nay, had no right to carry on the work, or to meddle with it in any manner at all, and that she had no connection with the same, until some two and a half years afterwards when she took charge of it under the act of 1876, the failure of the defense to make the facts of its case appreciated by the court, is lamentable indeed; the other inference of the court, that the right to draw warrants imposed a corresponding duty to collect and apply all drainage assessments to the payment of the warrants, is pregnant with the suggestion that it had no such duty to perform as to the assessment against itself on streets and other public property, since as to these, there was nobody to collect from, the city herself being, at most, their debtor, if they were valid, and her duty, if any at all, founded upon the assessments, being to *pay* and not to *collect;* in the language which follows, the court has disregarded all distinction between the assessments against private property, or the owners thereof, for which the city is said by the bill to be responsible by reason of her failure to collect, and the assessments against the city herself, as to which, at most, she is a debtor, and her duty, if any at all, simply to pay; the wide difference and important distinction between the status of each of these classes of taxes, are completely annihilated by the court, when it says, in its remarks on the amendment of 1884, that, "these taxes, being liabilities of the city, cannot by any cause or reason be included in the clause prohibiting the increase of the debt of the corporation, without imputing to the authors of the constitution an intent to defraud those who might deal with her, under the invitation of the constitution."

If the amendment has succeeded in making anything clear, it is that the drainage assessments there spoken of are not liabilities of the city; on its face, the language repels any such meaning or inference. The assessments against the city alone, could by any possible construc-

tion be deemed liabilities of the city, when the amendment was to go into effect; the assessments against private property were not and had never at any time been considered as liabilities of the city, but were obligations of private property, and of the owners thereof; the amendment, of course, did not obliterate any liability which the city was already bound to, but surely it could, in no event, convert assessments against private property into obligations of the city; the so-called assessments on streets and squares, etc., as we have argued elsewhere, were never at any time binding upon the city, and altogether without effect, as being made without any authority of law; the intent of the constitutional amendment was, that the city should not, by any process whatever, become a debtor of more than she owed on the first of January, 1875; therefore, this act of purchase in 1876 could not, in any of its results, whether by reason of misconduct on the part of the city or otherwise, be made to assume any form, by which the city, in consequence, would be a debtor of one dollar in excess of her indebtedness on January 1st, 1875; the ground upon which the city is said to be made liable herein, is that she abandoned the work of drainage and neglected to collect the tax, but if the amendment be given its proper effect, the city could not, by such negative conduct of acts of omission or neglect, do that which she was forbidden to do in the most positive and solemn manner; she could clearly make no contract in violation of the amendment, and, hence, could not, by inaction, accomplish that which she was positively and directly forbidden to do.

Such limitations upon the power of a municipality to incur indebtedness have always been upheld and have never been disregarded, upon the plea, either of convenience or necessity.

The constitutional amendment of 1874 prohibited the city from adding to its debt under any pretext whatever. The prohibition is sweeping and extends to any increase of debt in any manner or in any form; it matters not how necessary the work of drainage may be, or may have been considered. The purpose of the amendment was to strip the city of any discretion whatever as to the increase of its debt. The debt could not be augmented, however necessary in the city's judgment. Of all of this Van Norden had full notice when he sold to the city.

It matters not how great may be the necessity, real or apparent, for the city to incur debt beyond the constitutional limit, the prohibition, and not the necessity of the expense, controlls. This is well settled by authority. A limitation of indebtedness imposed by constitution or charter, extends to all forms of debt, bonded or floating, and embraces all transactions which may involve or affect indebtedness of any kind, beyond the limit allowed.

In Prince vs. Quincy, 105 Illinois, 138, the city undertook to con-

tract for the construction of water works, for a sum which, added to its existing indebtedness, exceeded the constitutional limit of five per cent. on its taxable property. It was claimed that a water supply was a necessary requirement of the city, and its provision was an item of ordinary current expense incident to the city's power of government and administration. While the necessity for work was admitted, the court held the contract to be void, as beyond the constitutional power of the municipality. The court declared that the rule applied was well settled in Illinois and admitted of no exception, citing several instances in support of its conclusion.

In Sacket vs. New Albany, 88 Indiana, 473, under a constitutional provision, in all respects similar to that of Louisiana, limiting the indebtedness of municipal corporations to two per cent. upon its taxable property, recovery for the price of a system of fire alarm, the necessity and importance of which is readily seen, was denied, on the ground that the contract, if permitted to stand, would create an indebtedness exceeding the limit. As in the case just cited, it was there contended that the contract should be upheld on the ground of the absolute requirement of a system of fire alarm for the protection of property, but this was found insufficient to sustain the contract, in view of the limitation of indebtedness.

In Valparaiso vs. Gardner, 97 Indiana, 1, under a similar provision of the constitution, a like rule was affirmed, although in the particular case the contract in question was held not to be a debt, and hence removed from the limitation of indebtedness.

In National Bank vs. Independent District of Marshall, 39th Iowa, 490, the contract of a school board for the construction of a school house, a purpose directly within the powers of the board and obviously a necessary object for the performance of its duties, was declared void for the reason that its payment would be in excess, over and above the indebtedness permitted by the constitution.

In Davis vs. Des Moines, 71st Iowa, 501, a local assessment for the construction of a sewer was contested by a property owner, on the ground that its cost would increase the city's debt, in violation of a constitutional provision by which it was limited to a certain amount. It was held that the assessment, which was to be paid by the owners of the adjacent property, was not a debt of the city, by reason of which it was not affected by the prohibition. On this ground the assessment was upheld, but the rule that all municipal indebtedness in excess of the constitutional limit was void, however necessary the public work for which it was contracted, was null and void, was declared.

This case is instructive in the present controversy. The drainage assessments as levied under the prior statutes, are fully recognized by the constitutional amendment of 1874. In this form they are not

affected injuriously by the amendment; but any process by which they are to be converted into absolute debts of the city, is in the teeth of the amendment, by which the city is prohibited from increasing her debt after the 1st of January, 1875, *in any form or in any manner or under any pretext.* In the face of such absolute injunction, the failure of the city to complete the work of drainage and collect the assessments, could not make it the debtor of the warrants sued upon. The amendment intended that not one dollar should be added to the city's debt no matter what the pretense. It would amount to little, if mere neglect or failure of duty, could bring about the very result, which it was the purpose of the amendment to make impossible.

In Scott vs. Davenport, 34 Iowa, 208, the city was expressly authorized by its charter to construct a water works plant. Here, too, the necessity of a water supply was imperative; yet, notwithstanding the express charter authority and the necessity of the work, the contract was annulled on the ground that it created an excess of indebtedness over and above the constitutional limit.

In Council Bluffs vs. Stewart, 51 Iowa, 385, proceedings, for the opening of a street, the work to be paid for by an issue of bonds, were set aside on the ground, that the bond issue would increase the municipal debt beyond the constitutional limit. The puplic requirements which necessitated the opening of the street, were considered insufficient to remove the contract from the constitutional rule, the court holding that the limitation applied to all debts of every description, for whatsoever purpose contracted.

In the decisions mentioned, there are cited many cases upon the question at issue, they are respectfully referred to the consideration of your Honors.

See also Read vs. Atlantic City, 49 N. J. L., 558.

In Appeal of City of Erie, 91 Pennsylvania St., 398, a contract for the construction of a market house, a necessary adjunct of municipal government, was attacked on the ground, that its price would add to the city's debt, to an extent that would exceed the limit placed upon it by the constitution. The contract was held void on this ground.

The decision of the courts of last resort of Illinois, Iowa, New Jersey and Pennsylvania, above cited, are in full accord with the jurisprudence of this court upon the same subject.

In Buchanan vs. Litchfield, 102 U. S. 278, bonds were issued in payment for the erection of water works; the bond issue with the existing municipal indebtedness exceeded the constitutional limit of five per cent. upon the taxable property of the city. Upon this ground the bonds were held void.

In Litchfield vs. Ballou, 114 U. S. 190, the contractor who built the water works just mentioned, sued to recover the money expended in their construction. The bonds, as is seen, having been decreed in-

valid upon the ground, namely, that the contract violated the constitutional limit of indebtedness, the relief sought was denied. The prime necessity of the work in question, as a means of supplying the city's inhabitants with water, was one of the conditions of the suit, but this in no respect hindered the court from maintaining the constitutional limitation of indebtedness.

In Doon Township vs. Cummings, 142 U. S. 366, bonds in excess of the constitutional limit were issued. They were, however, to be used in retiring previously existing debts, which were within the limit, and hence in the result there would have been no increase in the debt. This court held, however, that there would be an undoubted increase in the interval between the issue of the bonds and the taking up of the old debt, and this violation of the constitution, though temporary, and as the initial step towards paying a lawful debt, could not on that account be excused (page 372); the bonds were declared void.

The Supreme Court of Louisiana has had frequent occasion to construe and give effect to the constitutional amendment of 1874, and in every instance has maintained its most rigorous enforcement.

It has been said that this amendment "was a perfectly constitutional provision, operating *in futuro* only, and absolutely binding, not only upon the City of New Orleans, but on all persons dealing with the city. No clause or commentary can make its meaning more perspicuous. It rendered it impossible for the city, by any voluntary act, to increase her debt, in any manner, form, or under any pretext, and all persons were fully charged with notice that whatever services they might render, and whatever supplies they might furnish, that they could never become creditors of the City of New Orleans, because she was incompetent to contract additional debt." Taxpayers' Association et al. vs. City of New Orleans, 33 Louisiana Annual, 571.

In another case the court says: "We have rigidly enforced the constitutional amendment of 1874 as to debts created after its passage." Taxpayers vs. New Orleans, 33 Louisiana Annual, 568; State *ex rel.* Marchand, 37 Louisiana Annual, 19 and 20.

See also State *ex rel.* Gaslight Company vs. City of New Orleans, 37 Louisiana Annual, 438, citing Eager vs. New Orleans, 36 Louisiana Annual, 937.

State *ex rel.* Wood, Board of Liquidation, 40 Louisiana Annual, 413.

The pleas of prescription, in so far as their discussion is concerned, were ignored by the Court of Appeals; as to the assessments against the city, which had been merged into judgments, the plea was unquestionably good; there are two classes of taxes for which the liability of the city is sought to be fixed; first, those against private property; and, second, those against streets, public squares and property of a like character; as to the first, from their origin they were

charges against private property assessed and the owners thereof, they were not in any sense liabilities of the city; the contention of complainant is that the city has become liable for these assessments by reason of her failure to collect them and her abandonment of the drainage work; this failure and abandonment occurred in 1876, when the constitutional amendment was in force, which, by its very letter, was an insuperable obstacle to the city becoming the debtor of these assessments, by any process whatsoever; the second class of assessments, those against public property, are charged against the city as the primary debtor.

In defense it is claimed, that there was no authority under the act of 1858 for the making of these assessments; that, although, as a matter of fact, such property was listed by the commissioners, that this was a mere act of power, without warrant of law, and hence devoid of legal effect; it is argued, however, by the complainant, that this objection cannot now be made because the assessment rolls have been homologated, have been merged into the judgments by which they were homologated, and any question as to their illegality has been thereby foreclosed; as to this, it may be said that the judgments could have no greater force than the statutes which they were rendered to carry into effect, for the purpose of execution by collection through the sheriff, of the assessments intended to be authorized; whatever the statutes mean, the judgments mean; the latter are interpreted and limited by the statutes, which declared the liability which the judgments were designed to fix; the soundness of this position is maintained by the judgments themselves, which expressly declare that they are rendered in accordance with the acts of 1858 and 1861, by which reference the statutes are imported into the judgments as part thereof; and if there be doubt as to their meaning and effect, the judgments declaring that their purport and significance, are to be the same as the statutes in question, they are necessarily controlled and limited by the latter; the doings of the commissioners, and the homologation, extending no further than the authority derived from the statutes; hence, if the assessment of public property, was beyond the power of the commissioners conferred by the act of 1858, the judgments did not, nor were they intended to, enlarge the authority of the commissioners.

In the attempt to escape the effect of such interpretation of the laws, as would make the assessments on streets, public squares, etc., null and void, by the claim that such question is closed by the judgments of homologation, the complainant falls into another difficulty, equally if not more serious.

If the decrees of homologation are judgments, so far as to close all matters of defense, which might have been urged before they were rendered, it is impossible to save them from the effects of other rules applying to judgments; one of these is that established by article

3547 of the Revised Civil Code, by which judgments are prescribed in ten years, saving, however, to the judgment creditor or any other *person interested in the judgment*, by a timely suit for revival, brought within ten years from its rendition, to save the judgment from prescription; this latter provision would do away with all pretense of the city utilizing its status as a so called trustee, to allow the extinguishment by the lapse of time, of the judgments which its duty was, to keep alive; aside from the consideration that a suit by the city, as plaintiff, against itself as a defendant, for the revival of a judgment against itself would be a startling anomaly, the remedy of the warrant-holders relying in part on these judgments for payment, was wholly within their own hands; as persons interested in the judgments, they were, under article 3547, of the Revised Civil Code, authorized to have brought suits for the revival of the judgments, themselves; this course possessing the merit of possibility, while the process of the city suing herself would be difficult to conceive; if the judgments have, therefore, perished by the lapse of time, the responsibility lies not at the door of the city as is contended, but is chargeable to complainant, or his assignor, and his fellow warrant-holders.

This defense is disposed of by the Court of Appeals with the single remark, that the act of 1876 created an express trust in the city, by which the city undertook as trustee, to collect and apply the drainage assessments to the payment of the warrants; and that the statute of limitation is not set in motion until the trustee has disavowed the trust, and notice of its repudiation had been brought home to the *cestui qui trust*.

When it is considered that the act of 1876, says nothing whatever as to what composed the drainage fund, whether it was assessments against private persons and property, or assessments against streets, public squares, etc., and the city, or both, it is difficult to understand the assumption, that the act made the city a trustee of all character of assessments; if any part thereof, as they then stood upon the books, were invalid in law, there was nothing in the act of 1876 which could make them valid; there is no suggestion that the act of 1876 was to have any curative effect, or to make valid that which was before invalid.

We have seen that by the act of 1871, there was turned over to the city and she was directed to collect, only the assessments on private property, and it would be strange indeed, if the act of 1876 was intended to so enlarge the city's responsibility, as to charge her as trustee of the assessments against herself, and to have done so merely by implication.

And conceding, for the sake of argument, that the position of the court, altogether at variance with the law, is justified, its answer to this part of complainant's case would still perish, when tested by its

concluding portion, to the effect, that prescription is suspended until the trustee has disavowed his trust, and knowledge of such repudiation is brought home to the *cestui qui trust.*

The bill charges and the record shows, that the work of drainage was abandoned in 1876, the effect of which, according to the bill, was to make the taxes unenforceable; it would be a very violent presumption that such conduct by the city, attended with all the public notoriety surrounding a municipal act of such important and far reaching consequences, could have been done without coming to the knowledge of Van Norden, who had received three hundred thousand dollars of the warrants, to be paid out of the drainage taxes alone, which could not be collected unless the drainage system was completed.

To suppose that Van Norden, or the other warrant-holders, if, by that time, he had parted company with any of the warrants, would have been in ignorance of the conduct of the city, which is bitterly complained of in the bill, would be a severe tax upon credulity. This suit was instituted November 26th, 1894, about eighteen years after the city had ceased to prosecute the work of drainage, and consequently repudiated her trust, so called; the lapse of ten years alone would be sufficient to sustain the plea of prescription of the judgments against the city, even if she occupied the grotesque position assigned her by the Court of Appeals—that of trustee of a debt, if due at all due by herself.

To sustain the imprescriptibility of the assessment judgments, the court cites the case of Southern Insurance Company vs. Pike, 32d Louisiana Annual, 1037; McKnight vs. Calhoun, 36th Louisiana Annual, 408; if there be any resemblance between these cases and the one at bar, or any analogy between the propositions therein involved, and those concerned here, it is not revealed by the most searching examination; the slightest examination of these authorities will make this clear.

Regarding the statement of the opinion that under Insurance Co. vs. Pike, 32 Louisiana Aunual, 403, the trust created by the act of sale was continuing and executory, and under it the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the warrants, it may be said that the authority of the Pike case, and the others cited, are not questioned, but they are altogether without application in the present instance; the city here does not plead prescription against her accountability as trustee of the drainage taxes due by private individuals; she claims that the judgments against herself have been extinguished by prescription; we have argued that as to these judgments she is not a trustee, but a debtor, and all debts are subject to the statute of limitation in this State; the Pike case touches no question bearing any resemblance to the one at issue; Pike took possession of all the books, accounts, assets and property of

the Southern Insurance Company, with the obligation to collect and account for the assets; an action for an account could never be prescribed, except from the date that he repudiated the trust; this is no authority against the position that judgments against the city, like judgments against any other person, are subject to the law of prescription.

The Succession of Farmer, 32 Louisiana Annual, 1037, and McKnight vs. Calhoun, 30 Louisiana Annual, 408, are cited by the court to show that the city cannot claim a release from its indebtedness to the drainage fund, by pleading its own neglect to revive the judgments in proceedings to that end, when necessary; we have demonstrated, as we believe, the utter impossibility of the city bringing a suit against herself for the revival; on the other hand, the plain, positive, textual provisions of the Code gave the warrant-holders the right to bring such suits themselves; in view of which it is deemed not disrespectful to say, that the court has fallen into the error of charging the city with neglect, on account of her failure to do what she could not do, and has given no effect whatever to the fact, that the power to keep the judgment alive was at all times in the hands of the warrant-holders.

The Farmer and McKnight cases simply hold that the prescription of a debt is suspended, so long as there exists between the creditor and debtor such relation as will prevent any suit for the debt; there was nothing here to prevent the drainage warrant-holders from having their judgment against the city executed, or to have saved them from prescription by bringing suits to revive; the dissimilarity between the cases cited, and the cause here is conspicuous.

As to these judgments the city is not a trustee; the Pike case and those of like character, have no reference to the prescription of debts or judgments dischargeable in money, but even if they did, and the city be considered to any extent in a fiduciary relation as regards the judgments, this would not deprive the city of the benefit of prescription; not only under the articles of the Code themselves, but their construction by the Supreme Court of Louisiana; it has been held by the Supreme Court of the United States, that "no laws of the several States have been more steadfastly or more often recognized by this court from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court." Bauserman vs. Blount, 147 U. S. 647, 652, citing numerous authorities; also Beal vs. Oden, 163 U. S. 73.

In concluding its remarks upon the subject of this plea, the court below says, that it is doubtful whether statutory assessments of the character in question are subject to any prescription at all, and cites Reed vs. His Creditors, 39 Louisiana Annual, 115, which, in turn, cites

State vs. Jackson, 34 Louisiana Annual, 176, and Davidson vs. Lindop, 36 Louisiana Annual, 707, to the effect that prescription established by the Civil Code does not apply to taxes; this part of the opinion again recalls the lamentable failure of the defendant to make its case clear.

The answer is barren of any plea of prescription leveled against the assessments themselves. The prescriptions pleaded are, first, that applying to the warrants sued upon, which is an "effect transferable by endorsement or delivery," any action upon which, is barred by the prescription of five years; Revised Civil Code, Art. 3540; second, that of ten years, which bars any and all personal actions of any character whatsoever, established by article 3544, of the Revised Civil Code.

These two prescriptions, it will be observed, apply to the action and not to the grounds of liability, which it is sought to enforce; they do not concern themselves with the strength or weakness of the title; the action, however otherwise well founded, cannot be brought after the lapse of time stated in each case; the inquiry does not extend to the merits of the action in any respect; these articles bluntly declare, that after the lapse of five years in one case, and of ten years in another, the action cannot be brought.

It is unnecessary to say more than to point out to the court, that these two prescriptions are too widely different from, to be confounded with, any plea of prescription against the assessments, which this suit is brought to enforce.

The other prescription—the one immediately under discussion, that of ten years—applying to judgments, concern the latter alone, and not the assessments which the complainant insists have been merged and lost in the judgments themselves.

A slight examination of Reed against His Creditors, State vs. Jackson, and Davidson vs. Lindop, will inform the court that two things cannot be more widely apart than the principles upon which the cases were decided, and that which they are cited by the court to uphold.

Whether or not the assessments in question are subject to prescription at all, which the court says is not certain, but only doubtful, the decisions of the Supreme Court of Louisiana cited to show that they are not, it is respectfully suggested do not at all sustain the proposition; they were interpretations of special statutes, altogether different in character from those imposing the assessments here; they concerned general taxes, and not local assessments; the case of Reed vs. His Creditors, held that city taxes levied under section 20 of the charter of 1870, were, by its *express terms*, imprescriptible; that state taxes, levied under the provisions of Act 37, of 1871, and Act 36, of 1869, found by the court to contain language of similar import to that contained in the city charter, were not subject to the laws of prescrip-

tion; in both cases the taxes were held imprescriptible, because the statutes under which they were levied, said so; far from sustaining the position that the drainage taxes were originally imprescriptible, they would rather tend to the contrary, because the law of 1858 contains no express exclusion of the law of prescription, while the statutes under consideration in the Reed case were held to save the taxes from prescription, because it was so said, in terms.

Davidson vs. Lindop, 36th Louisiana Annual, 765, is also an interpretation of section 20 of the city charter of 1870, containing a clause which expressly made the taxes imprescriptible; the Jackson case, 34th Louisiana Annual, 178, was likewise a construction of special statutes, under which general taxes were levied, presenting no point of resemblance to the assessment acts under consideration here; under article 3547 of the Revised Civil Code, in ascertaining whether or not the prescription which operates as a release from debt, should be applied, the law regards simply the lapse of the requisite time; that in such a prescription, unlike that by which property is acquired, neither good faith nor a just title is necessary; this would not, as seems to be supposed, involve the monstrosity of freeing an agent or trustee, to whom property has been confided for another, from the obligation of accounting for the same, after the lapse of a certain period from the inception of the agency or trusteeship; in such case the obligation of the trustee would not be to pay money, but to account for a trust. Prescription, it is true, as to the accounting, would not begin to run until the trustee had placed himself in antagonism to his trust, by setting up a title inconsistent with, or repudiating it; but here we have no such question to deal with; the city pleads that she has been released from any debt founded on the drainage judgments against her, by the lapse of ten years from their rendition; we are told that the city herself should have revived these judgments; but, as has been shown hereinbefore, this, it was impossible for the city to do, had she so desired, for she could not sue herself, and occupy the position of both plaintiff and defendant in the same suit, while, on the other hand, the warrant-holders were at full liberty, under the articles of the Code, to have brought their own suits for revival.

It should be borne in mind, however, that, as this contest, and all the transactions relied upon by complainant, began and ended in the State of Louisiana, they are governed by the laws of that State; under these laws, good faith is not required to enable a party to invoke the prescription which operates as a release from debt; articles 3528, 3530, 3550 of the Revised Civil Code; under the law of that State, the fact that a party is a trustee does not deprive him of the benefit of the prescription *liberandi causa* in a case like the present; we have already shown, that the cases of Insurance Company vs. Peake, Suc-

cession of Farmer, McKnight vs. Calhoun, are so different from the present case, both in point of fact and the law to be applied, that they are no authority in this controversy.

On the other hand, it is established by decisions of the Supreme Court of Louisiana that a party occupying the supposed position of trustee, which the city is driven into by the opinion of the Court of Appeals, may plead prescription against liability resulting therefrom, under conditions similar to those found here.

That the city was the trustee of the drainage judgments, charged with the duty of collecting them, and consequently cannot be heard in any respect to impeach their validity, and hence is estopped to set up that the judgments against it are prescribed, cannot be successfully contended here; the law of prescription is found in the Civil Code, which is a statute of the State of Louisiana, as to the construction of which, the decisions of the Supreme Court of Louisiana control; in the case of Brown vs. Insurance Company, 3d Louisiana Annual, 177, the facts were almost identical with the present case; certain parties were directors of a corporation; among the uncollected assets of which, were certain stock subscriptions, due by the directors themselves; these were never paid, nor were any steps for their collection taken by the directors; in this condition ten years elapsed from the time the subscriptions became due, after which period, a judgment creditor of the corporation, which latter had become insolvent and passed into the hands of liquidators, garnisheed one of the stock subscribers, who was also a director; he set up that the obligation was prescribed; the court said that the directors had neglected to act in the matter, notwithstanding which, the creditors of the company were not without remedy; that they might have caused the company to be administered, and the necessary calls to pay the subscriptions made and enforced; that the prescription which operates as a release from debt does not require the debtor to produce any title, or that he should be in good faith (Revised Civil Code, article 3530); the neglect of the creditor alone operates the prescription; when he is present, and his silence has continued for ten years, the law presumes payment; that good faith not being required for that class of prescription, the relation which existed between the garnishee and the defendants, could be no obstacle to it; the court said it must hold, therefore, that the relations of the party under the contract or the charter, did not affect the general law on the subject.

In Wagoner vs. Philips, 22d Louisiana Annual, 152, it was held that article 3476 (now article 3510), to the effect that those who possess for others, and not in their names, cannot prescribe whatever may be the time of their possession, which, in substance, is the principle contended for by complainant here, namely, that the city as trustee cannot plead prescription of the judgments against herself, of

which she was the custodian, did not apply to the prescription which operates as a release from debt; that the presumption of payment resulted from the lapse of the necessary time, *juris et jure.*

It is contended, however, that there are decisions of the Supreme Court later in date which overrule, Brown vs. Union Insurance Co.; the decisions cited are the following, as to which it may be said that no one in the slightest degree impeaches the authority of the Brown case found in 3d Louisiana Annual; this is apparent from the slightest examination of the cases; these have already been discussed, but may be again reviewed in this connection.

The first is that of the Succession of Farmer, 32d Louisiana Annual, 1037; this case holds that as an administratrix cannot sue the succession she represents, prescription will not run against her on her claims against the succession as long as she is administratrix, because, being legally incapaciated from judicially enforcing her claim by the law, its prescription is suspended under the law of *contra non valenam prescriptio non currit;* see 32d Louisiana Annual, p. 1041; a dictum altogether foreign to any question involved here.

McKnight vs. Calhoun, 39th Louisiana Annual, 408, to the effect that where there is a debt due by an administrator individually to the succession which he represented, prescription is suspended during his administration; there is nothing in this case which touches the rule invoked by defendant; here the assessments are in the form of judgments, and the question is, whether those judgments were saved from prescription by the fact that they were against the city herself; in the McKnight case the only party having the right to sue for the debt was the administrator himself, and hence there would be a reason why prescription should be suspended; here, however, the case is widely different; the assessments being in the form of judgments against the city, an action to revive the latter could have been brought by any one interested in the judgments; this, according to the textual provisions of article 3547 of the Revised Civil Code; therefore, the reasoning of the McKnight case is of no pertinence in the present case; in the former, the succession and its creditors were without remedy; here the remedy of the drainage warrant-holders was complete and perfect; they had the right to bring a suit to revive the judgments; they were not left entirely in the hands of the city, as the succession in the hands of the administrator was in the McKnight case; the city could not *sue herself* for the revival of the judgments, but the drainage warrant-holders had their remedy in their own hands, while in the McKnight case the situation was different; the creditors were without remedy, except such as could be availed of, by the administrator himself.

Parish Board of School Directors vs. The City of Shreveport, 47th Louisiana Annual, 1310, is equally wide of the mark; it holds

that where the defendant had collected taxes for school purposes, carried as such on the annual budget of expenses, that they must be applied to the purposes specified by the budget, and that the city could not plead prescription of one year against the taxes thus collected; in the present case, the defendant has collected no taxes, and does not plead prescription against any demands for funds which are in her possession, received for purposes designated by law; such would have to be the facts, for the 47th Louisiana Annual case to have any controlling influence; the position of the defendant is simply that the drainage warrant-holders have allowed judgments against her to prescribe, and it is no answer to say that she, as trustee, cannot plead prescription; she is not pleading her own laches or neglect, but that of the drainage warrant-holders themselves, who had the right, under article 3547 of the Civil Code, to revive the judgments against the city; having failed to do so, prescription has run, and the judgments are extinguished.

Nor is the case of complainant in any way strengthened, by its claim that the drainage assessments are governed by the law of prescription as concerns taxes levied for purposes of general revenue; and this cannot be more clearly demonstrated than by a reading of the two cases cited in support of that proposition; that of Davidson vs. Lindop, 36th Louisiana Annual, 766, declares that the city taxes for the years 1871 to 1879 are imprescriptible, and cites section 20 of the city charter of 1870, misprinted 1879, the effect that all taxes levied under that charter are declared a lien and privilege upon the property until they are fully paid; it is sufficient to say that the drainage assessments in question here were not levied under the city charter of 1870, and hence that Davidson vs. Lindop, refers to a subject, entirely apart from any issue presented here; nor is Reed vs. His Creditors, 39th Louisiana Annual, 115, of any more pertinence; this case simply holds the laws of prescription are *stricti juris*, that at most they constitute a bar to the assertion of rights judicially; that they are neither self-acting nor self-enforcing; that prescription proceeds upon the theory that one in whose favor a right once existed, has lost his judicial recourse for its enforcement, by reason of his own neglect; that such an equity cannot arise in favor of the subject against the sovereign, by reason of the failures of her officers to perform their duty; this case may, in brief, be considered as holding that the law of prescription in the Civil Code has no application to the State or city as a bar to the *collection* of taxes due to either; it requires nothing more than to say that no such question arises here; the drainage judgments are not in favor of the city or the State, but, on the contrary, *against* the former; they exist in favor of the holders of drainage warrants, private persons, and the question here is the reverse of that before the court in the Reed case; there it was, whether prescription could be pleaded by

a private person against the claims of the city or State for their taxes; the issue here is whether the city herself can set up the bar of prescription against judgments against herself for the benefit of private persons; it is manifest that the two cases touch each other at no single point, and present no single feature in common.

There is a serious ground of complaint against the Court of Appeals, in its not disposing of the plea of *res adjudicata*, made by the answer; this plea, if well founded, would have terminated the controversy; but defendant is left by the opinion, in ignorance as to whether or not the consideration of this plea, formed any part of the court's deliberations; in the opinion, it is passed by in silent contempt; but it is respectfully submitted that an examination of the facts upon which it is based, will show conclusively that it should have been maintained.

The plea of *res adjudicata* is based upon the fact that in the case of Peake vs. New Orleans, James Jackson, by intervention, joined with the complainant Peake in the relief which he sought; Jackson sued upon a judgment of law obtained in the Circuit Court; reference to the petition in that case shows, that the warrants of Jackson were not "work warrants" or "construction warrants," as were those sued upon by Peake, but "purchase warrants," issued in payment of the city's purchase, made in 1876, under the legislative act of that year; and identical in all respects with those sued upon here by Warner, the complainant, the decree in the Peake case was against complainant; as well as against all those who joined him by intervention, and hence the present suit of Warner is based upon the same cause of action as that set out by Jackson's intervening bill in the Peake case, which, along with the original bill, was dismissed by the Circuit Court.

The presence of the purchase warrants, as an issue, in the Peake case, appears in bold relief in the opinion of the Circuit Court in that case, found in 38 Federal Reporter, 782; the point was there made that a part of the warrants there involved were purchase warrants, and for that reason stood upon a higher footing than the work warrants sued on by Peake, complainant; but the Circuit Court, through Judges Pardee and Billings, held that both classes of warrants were alike, and the city's liability on the purchase warrants, was rejected along with that on the work warrants.

The purchase warrants being all alike, that is to say, all issued for the price of the city's purchase—all parts of the same transaction—the status of one is the status of all; and the judgment adverse to Jackson, as regards his warrants, fixed the status of the entire series, including those sued on by complainant, as regards their being the source of any liability of the city; it would be a remarkable result that if Jackson, by reason of his having made an appearance in the

Peake case, should have no right to the payment of his warrants, while complainant, standing aloof, should obtain here a decree entitling him to payment for the same kind of warrants, which Jackson failed upon in the Peake case; whatever is true of the purchase warrants sued on in the Peake case, is likewise true of those sued on in the present case; that the difference set up between the two classes of warrants was an issue in the case is shown by the citation thereof from 38 Federal Reporter; but it is sufficient to say that a claim against the city, founded upon purchase warrants, having been rejected in the Peake case; the same claim, made here, should meet with a like fate.

The action of the court in decreeing that the city was the debtor of the drainage warrants sued upon, is without pleading of the complainant to sustain it; the bill proceeds upon the theory that the city has made herself responsible for the drainage taxes assessed against private property and is the primary debtor of those assessments against streets, public squares, etc.; it nowhere asks that the warrants themselves, independent of the taxes, be declared a liability of the city; it simply asks that the warrants be paid out of the taxes for which the complainant seeks to make the city liable; the error of making an absolute decree against the city is only exceeded by the more objectionable part of the decree, which allows interest at eight per cent. per annum from July 7th, 1876.

Act No. 16, of 1876, provides for no interest on the warrants, neither does the act of sale and purchase, for which the warrants were given, as a price; it is true, that the act of 1871 declares that the purchase warrants shall be issued in the same form and manner as those theretofore issued to the transfer company, under act of 1871, for work done, but this, by no reasonable construction, could be held to include the allowance of interest; nor does the circumstance that the warrants themselves provide that they shall bear such interest after their presentation, non-payment, or their endorsement, showing these facts, the administrator of accounts or of finance, by signing the warrants, could thereby produce no effect not authorized by the statute of 1876, as all of their doings were obviously referable to the statute under which they were acting, beyond which they were wholly without power; the effect of this allowance of interest would be to more than double the amount of the warrants; this will not be countenanced unless within the clear intendment of the law, which, manifestly, does not go this far.

Respectfully submitted,

SAMUEL L. GILMORE,
City Attorney.

BRANCH K. MILLER,
Solicitors for Petitioner.

No. 172.

Brf. & Gilmore v. Miller for Pet. for Cert.

Office Supreme Court U. S.
FILED
DEC 27 1899
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Dec. 27, 1899.

No. 172.

CITY OF NEW ORLEANS, PETITIONER,

versus

JOHN G. WARNER, RESPONDENT.

Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER ON RESPONDENT'S APPLICATION FOR A REHEARING.

Your Honors having granted respondent the right to file a petition and briefs for a rehearing herein, on the question of interest alone, it is deemed not improper by petitioner to lay before the Court its views upon this subject.

The Court has found in its opinion that there was no presentment of the warrants sued upon for payment, such as its terms and statute required; and that there was no waiver of such presentment. In the view of respondent, there is no basis afforded, either by the act of 1876, under

which the warrant was issued, or the contract made under its authority, for the allowance of any interest at all.

The provision of Sec. 3 of Act 16 of 1876 is that the warrants, in which the price of the purchase thereby authorized, was to be paid, "shall be issued in the same form and manner as those heretofore issued to the transferee of the said company, under Act 30 of the acts of 1871, for work done." It will be observed that Sec. 6 is silent as to the amount of price to be paid, also whether or not the same should bear interest, save so far as the item of interest may be imported into the contract by the reference to the act of 1871.

Turning to this statute we find that nothing is there provided as to the form of the warrant, save that it shall be drawn by the Administrator of Accounts on the Administrator of Finance, in such denominations as might be required by the president of the Canal Company. This is followed by the provision making it the duty of the latter official to pay the warrant on presentation to him, in case there be any funds in the city treasury to the credit of the Canal Company, but should there not be sufficient funds to cash the warrant the administrator is required to endorse upon the same the date of presentment, after which date the warrant should bear interest at the rate of 8 per cent. per annum, until paid. The concluding language of the section provides that this condition shall be set forth in the form of the warrant.

Under the law of Louisiana any obligation to pay conventional interest is invalid, unless evidenced by written agreement. Testimonial proof of the same is not permitted in any case. Revised Civil Code, Article 2924, paragraph 4.

Reid vs. Duncan, 1st La. An. 267.

Bayley & Pond vs. Stacey & Poland, 30 La. An. 1212.

The law requiring that the evidence of a promise to pay

interest must be in writing, it is a fair inference that the evidence relied upon must be clear, convincing and free from doubt. It is respectfully submitted that the ground upon which interest is herein claimed is not sufficient to sustain complainant's contention; the notarial act which shows price to be paid (see transcript, p. 100) is silent as to interest, the stipulation being simply that the sale is "made and accepted for and in consideration of the price and sum of $300,000, payable in drainage warrants;" ordinance 3539 (Trans. p. 104), authorizing the mayor to make the contract for the city, and fixing the price of the same, declares, "that upon the execution of the aforesaid notarial agreement, the Administrator of Accounts be, and he is hereby authorized and directed to warrant upon the Administrator of Finances for $300,000 in drainage warrants, in *full settlement*, as above provided;" the ordinance likewise containing no provision as to the payment of interest.

The only ground upon which the warrants could be considered as bearing interest would be that a stipulation for its payment properly enters into the "form and manner" of drawing them, as directed by Sec. 6 of the act of 1876; this however is borne out by the Record.

If there be any doubt whether or not petitioner is bound for the payment of interest on the warrants sued upon, this would be sufficient for it to go free from any obligation of that character, as by the express provisions of article 1957 of the Revised Civil Code, in a doubtful case the agreement is interpreted in favor of him who has contracted the obligation.

It seems reasonable to assume that if the Legislature contemplated that the price paid should bear conventional interest, which in the case of natural persons is never paid except where expressly stipulated, that it would have placed the matter beyond any doubt at all by following the invariable course in transactions between individuals, namely, by

providing in so many words that the price to be paid was to bear interest at a certain rate; it is only, however, by reference to the act of 1871, to ascertain in what form the warrants were to be drawn, that the matter of interest can be imported into the contract, if it has any place therein at all.

It will be noted that the Act of 1871 contains first, a direct positive and substantive declaration, that the warrants therein described are to bear interest at 8 per cent. from the date of their presentment for payment, and this is followed by the subordinate provision that this condition shall be set forth in the form of the warrant; it is difficult to understand why the Legislature, if it intended that the city should be charged with interest on the purchase warrants, that it should have left such intention to be understood by a mere reference in general terms to the form in which the warrants were to be drawn; this may have left many persons, at the time, under the impression that such an important feature of the contract was not intended to be left to interference or construction, and hence, wholly negative the allowance of any interest at all; especially so in view of the law of the state, which denies all conventional interest, where the same is not expressly stipulated in writing; to leave the discovery of an agreement to pay interest to a scrutiny of the form of the warrant, with no express reference by the Act of 1876, at all to the subject of interest, is not in harmony with the care and wisdom commonly attributed to legislators; the payment of the interest was no less important than the payment of the price itself, and in the present case, if interest be allowed from the day the warrants were presented, it would exceed by about one fifth the price itself; it would be more reasonable to interpret the "form and manner" of drawing the warrant, mentioned in Sec. 6 of the Act of 1876, as referring to what it would naturally mean; that is, the formal requisites of the warrant, as a means of ob-

taining the payment of public money, namely, that it should be drawn by the Administrator of Accounts on the Administrator of Finance; it should not be extended to such serious matters of substance as the payment, in the way of interest, of any amount beyond the price agreed on.

The law of Louisiana regarding an agreement to pay interest, as of such importance as to make its existence depend solely upon written evidence, it is fair to say that even where the evidence is in this form, it should be clear, convincing and free from doubt; the obligation to pay interest here is to be constructed from the language of a general reference to an act of the legislature, which provides that an express provision of that act requiring the payment of interest, shall be incorporated in the form of the warrant; in the Act of 1871 this provision as to the form of warrant follows the other substantial and independent declaration that interest shall be paid; the substantial and serious element is provided before the formal.

It will be observed that the right of the Administrator of Finance to make the endorsement of the date of presentation is conditioned upon their being no funds in the treasury available for its payment. It is only as a consequence of this fact that he has any authority to make the endorsement. Its existence or nonexistence is jurisdictional, and the endorsement in any event should recite the fact which is a condition precedent to any right to make it.

Respectfully submitted,

SAMUEL L. GILMORE,

City Attorney.

BRANCH K. MILLER,

Solicitors for the City of New Orleans, Petitioner.

DECEMBER, 1899.

No. 640. 172

Assignment of Errors.

Office Supreme Court U. S.
FILED
MAR 14 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Mar. 14, 1899.

No. 640.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

JOHN G. WARNER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ASSIGNMENT OF ERRORS.

First. That the United States circuit court of appeals for the fifth circuit is and was without jurisdiction to hear and determine this cause; that the case involves the construction and application of the Constitution of the United States, especially section 10 of article 1, and also the fourteenth amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which involves the construction or application of the Constitution of the United States.

That in this case certain laws of the State of Louisiana

are claimed to be in contravention of the Constitution of the United States, to wit, that by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the General Assembly of the State of Louisiana, No. 48 of the year 1877, excluding certain lands from all liability for drainage taxes and canceling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the General Assembly of the State of Louisiana, No. 67 of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed, and section 42 of act No. 20 of the General Assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the city of New Orleans or portions thereof and the collection of drainage-tax assessments are unconstitutional, null, and void, because repugnant to the Constitution of the United States, especially section 10 of article 1 and the fourteenth amendment of that Constitution, prohibiting all State legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *vs.* City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-liability of the city for assessments against streets, public squares, and property of a like character, the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescrip-

tion and *res judicata;* that while the case of Peake *vs.* City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, the plea could only be sustained by evidence, and hence the court could on the demurrer have no knowledge of its scope. In any event, the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the demurrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata.*

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that the city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estoppel it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard, and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of The New Orleans Drainage Co., 11 An., 338; Marquez *vs.* City of New Orleans, 13 An., 319; Correjolles *vs.* Succession of Foucher, 26 An., 362; Barber Asphalt Paving Co. *vs.* Gogreve, 41 An., 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean *vs.* City of Bloomington, 106 Ill., 209.

Eighth. That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no farther than to those issued under act No. 30 of 1871, and by no interpretation could be held to include warrants issued under the subsequent act, No. 16 of 1876; that the said assessments against public property were not confirmed by act No. 30 of 1871, such confirmation as may have been given by said act having reference exclusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets

and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876 or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the State of Louisiana; that the statutes of limitations of the several States and the interpretation given them by the highest court of the State in question are binding as rules of decision in the Federal courts; that the laws of prescription of the State of the Louisiana and their construction given by the supreme court of this State, so far as they operate as a release from debt, depend for their application solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute, without further condition, constitutes a complete defense. Hence, even if the city, as erroneously held by your honors, was a trustee, the plea of prescription as against the said assessments against public property and the judgments therefor should

have been maintained; that the case of Insurance Company *vs.* Pike, 32 An., 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but, on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessment against herself is error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant to revive a judgment against herself; that this would not leave complainant without a remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival; so that it is the warrant-holders and not the city who have allowed the said judgments to prescribe. The city was absolutely without power to revive them, while the warrant-holders were free to have done so. In consequence of this and other considerations the cases of the Succession of Farmer, 32 An., 1037; McKnight *vs.* Calhoun, 36 An., 408, to the effect that the prescription of debts due by a succession to its administrator and *vice versa* is suspended, while the administration continues, are without application here; that whether or not the assessments as originally made are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character. That the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code, the case of Reed *vs.* His

Creditors, 39 An., 115, citing State *vs.* Jackson, 34 An., 178, and Davidson *vs.* Lindop, 36 An., 767, construing, as they do, the particular provisions of special statutes presenting no feature in common with those presented here; the statutes interpreted by those cases differing *in toto* from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and hence furnish no authority upon the question of prescription here at issue."

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decree of the United States Supreme Court and of the circuit court for the fifth circuit and eastern district of Louisiana in the case of James W. Peake *vs.* City of New Orleans, No. 11614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, pages 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed in any event the amount of its bond issue, described in the answer as a credit in her favor, on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opinion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer. The record at that time necessarily did not and could not make the showing of facts which is now before the court, namely, that Van Norden, the vendor of the city,

received, either himself personally or through his employés, assignees, or transferees, the entire issue of the bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record. The bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence was a diminution of the outstanding drainage fund, and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal consequences of a certain act, against which the laws of Louisiana does not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, as shown by your honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake *vs.* New Orleans, 139 U. S., 342, the Supreme Court held that the city had the right to abandon the work of drainage; that such an abandonment was no cause of liability to warrant-holders; that while the opinion was with reference to work or construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defense the court erred.

Fourteenth. That the court erred in holding that the city of New Orleans was a debtor of John G. Warner, the com-

plainant, in the sum of six thousand dollars, with eight per cent. interest, from January 6, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares, and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warren Van Norden, transferee, to said city, under the authority of act 16 of the legislature of the State of Louisiana, approved February 24, 1876.

Sixteenth. That the court erred in holding that the city in any mode should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city in any event for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to give due effect to the appointment of a receiver for drainage taxes. This suit, if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the General Assembly of the State of Louisiana, Nos. 48 and 67 of 1877 and section 40 of act No. 20 of 1882, were full and complete authority and justification of the city of New Orleans for having abandoned the work of drainage, and also a full defense to the liability asserted in this suit against her for any non-collection of drainage taxes.

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